133-514

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1381.

PAUL LOUIS BURTHE AND DOMINIQUE FRANCOIS BURTHE, PLAINTIFFS IN ERROR,

vs.

ARTHUR DENIS, DATIVE TESTAMENTARY EXECUTOR OF THE SUCCESSIONS OF L. F. FOUCHER DE CIRCÉ AND MRS. L. F. FOUCHER DE CIRCÉ.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED OCTOBER 16, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1381.

PAUL LOUIS BURTHE AND DOMINIQUE FRANCOIS BURTHE, PLAINTIFFS IN ERROR,

vs.

ARTHUR DENIS, DATIVE TESTAMENTARY EXECUTOR OF THE SUCCESSIONS OF L. F. FOUCHER DE CIRCÉ AND MRS. L. F. FOUCHER DE CIRCÉ.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

INDEX.

	Original.	Print.
Caption	1	1
Copy of proceedings had in the civil district court	2	1
Motion to consolidate	2	1
Motion to consolidate	3	1
Petition of dative testamentary executor to file tableau of distribution	4	2
Order for notice	5	3
Tableau of distribution	5	3
Opposition to account and tableau	9	3
Note of evidence for executor	14	8
Note of evidence for opponents	17	9
Document X Y Z (offered in evidence, p. 17)—Admissions	21	11
Exhibit "E" (offered in evidence, p. 18)—Award	25	14
"F" (offered in evidence, p. 18)—Letter of A. O. Aldis	25	14
"G 1" (offered in evidence, p. 19)—Letter of Alex. Porter Morse	26	15
"G 2" (offered in evidence, p. 19)—Letter of Alex. Porter Morse	28	16
"G 3" (offered in evidence, p. 19)—Letter of Alex. Porter Morse	30	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 7, 1889.

	Original.	Print
Exhibit "H 1" (offered in evidence, p. 19)—Letter of Edward Janin	32	17
"H 2" (offered in evidence, p. 19)—Letter of Edward Janin	38	20
"H 3" (offered in evidence, p. 19)—Letter of Edward Janin	39	21
"H 4" (offered in evidence, p. 19)—Letter of Edward Janin	39	21
"H 5" (offered in evidence, p 19)—Letter of Edward Janin	41	22
Document "C" (offered in evidence, p. 18)—Affidavit of P. L. and D. F. Burthe	42	22
Document "H 6" (offered in evidence, p. 19)—Letter of Edward Janin	46	24
Opinion	51	26
Judgment	56	29
Motion and order for appeal	57	30
Bond of appeal	59	31
Agreement as to record on appeal	62	32
Certificate of clerk of civil district court	63	32
Transcript of appeal filed	64	33
Cause submitted	65	33
Reasons for judgment	66	34
Dissenting opinion	69	35
Judgment and decree	70	36
Petition for rehearing (omitted in printing)	72	36
Reasons for refusing rehearing	90	37
Rehearing refused	91	37
Rules of the French and American Claims Commission, marked "B," (offered in evidence, p 18; parts omitted in printing)	92	38
Memorial, Document "A" (offered in evidence, p. 15)	108	42
Brief, marked "D" (offered in evidence, p. 19; parts omitted in printing)	135	55
Extracts from red book—Report of Hon. Geo. S. Boutwell, entitled "Final report of the agent and counsel of the United States, with treaties and schedule of claims," including report on claims of Archbishop Perché and of P. S. Wiltz (offered in evidence, p. 20; parts omitted in printing)	208	60
Exhibit "A," part of said report of U. S. counsel (offered in evidence, p. 17; omitted in printing)	289	62
Petition for writ of error	321	62
Order granting writ of error	326	65
Copy of writ of error lodged in clerk's office	327	65
Assignment of errors	330	67
Bond for writ of error	335	70
Acknowledgment of service of citation (copy)	339	72
Writ of error	340	73
Acknowledgment of service of citation	343	74
Certificate of clerk	344	75
Certificate of presiding justice	344	75
Stipulation as to printing record	346	76

1 Supreme Court of the State of Louisiana.

Succession of L. F. FOUCHER DE CIRCE
and
Succession of Mrs. L. F. FOUCHER DE CIRCE. } No. 10356.

Henry Chiapella, Esq., att'y for dative testamentary executor and appellant; Charles Carroll and Henry Denis, Esqrs., att'ys for opponents and appellees.

Transcript of appeal filed in the supreme court of La., at New Orleans, March 18th, 1889.

Transcript of Record of Lower Court and Proceedings Had in this Honorable Court.

(On appeal from the civil district court for the parish of Orleans.)

2 *Proceedings in the Civil District Court.*

Copy of transcript.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, Division "A."

Succession of L. F. FOUCHER DE CIRCE
and
Succession of Mrs. L. F. FOUCHER DE CIRCE. } Nos. 2036 & 2037.

Motion to Consolidate. Filed December 21st, 1885.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, Division "A."

MONDAY, *the 21st Day of December*, 1885.

Present: The Hon. A. L. Tisset, judge.

Succession of L. F. FOUCHER DE CIRCE
and
Succession of Mrs. L. F. FOUCHER DE CIRCE. } Nos. 2036 & 2037.

On motion of Henry Chiapella, of counsel for Arthur Denis, dative testamentary executor in the above-entitled successions, and on suggesting to the court that the succession of L. F. Foucher de Circe is merged into that of his wife and universal legatee, now deceased, and on further suggesting that the universal legatees of Mrs. Foucher de Circe, by representation of their said testatrix, are the sole parties in interest in the succession of the said L. F. Foucher de Circe,
3 and in the tableau of distribution which your mover is now prepared to file as dative testamentary executor aforesaid—
It is ordered by the court that the said two successions of L. F.

Foucher de Circe and wife be now consolidated, and that case No. 2037, pending before division "A," be, and is hereby, transferred to division "B" for all further proceedings to be held herein.

Division "B," Civil District Court.

Succession of L. F. Foucher de Circe and Succession of Mrs. L. F. Foucher de Circe. } Nos. 2036 & 2037.

Motion to Consolidate. Filed December 21st, 1885.

State of Louisiana:

Civil District Court for the Parish of Orleans, Division "B."

Monday, *the 21st Day of December*, 1885.

Present: The Honorable W. T. Houston, judge.

Succession of L. F. Foucher de Circe and Succession of Mrs. L. F. Foucher de Circe. } Nos. 2036 & 2037.

On motion of Henry Chiapella, of counsel for Arthur Denis, dative testamentary executor of the successions of L. F. Foucher de Circe and of Mrs. L. F. Foucher de Circe, and on suggesting to the court that the succession of L. F. Foucher de Circe is merged into that of his wife and universal legatee, now deceased, and on further suggesting that the universal legatees of Mrs. Foucher de Circe, by representation of their said testatrix, are the sole parties in
4 interest in the succession of the said L. F. Foucher de Circe, and in the tableau of distribution which your mover is now prepared to file as dative testamentary executor aforesaid—

It is ordered by the court that the said two successions of L. F. Foucher de Circe and wife be now consolidated, and that case No. 2037, pending before division "A," be, and is hereby, transferred to division "B" for all further proceedings to be held herein.

Petition of Dative Testamentary Ex'r to File Tableau of Distribution. Filed December 23rd, 1885.

Civil District Court, Parish of Orleans, Division "B."

Succession of L. F. Foucher de Circé and Mrs. L. F. Fourcer de Circé. } No. 2036 and No. 2037.

The petition of Arthur Denis, dative testamentary executor of the successions of L. F. Foucher de Circé and of Mrs. Felicie Burthe, widow of L. F. Foucher de Circé, consolidated by order of this honorable court, of date December 21st inst., respectfully represents that he files herewith a tableau of distribution as such testamentary

executor of said consolidated successions, which he prays may be filed and advertised according to law.

5 And your petitioner further prays that after all due proceedings had that said tableau be approved and homologated and the funds ordered to be distributed in accordance therewith.

And for all further aid and relief needful in the premises.

(Signed) HENRY CHIAPELLA,
Attorney for Petitioner.

Order.

Let due and public notice be given according to law of the filing of the account and tableau of distribution by Arthur Denis, dative testamentary executor of the consolidated successions of Mr. and Mrs. L. F. Foucher de Circe.

New Orleans, December 23rd, 1885.

(Signed) W. T. HOUSTON, *Judge.*

Tableau of Distribution. Filed December 23rd, 1885.

Civil District Court, Parish Orleans, Division "B."

Succession of Mr. and Mrs. FOUCHER DE CIRCE, Consolidated. Nos. 2036 & 2037.

Civil Dist. Court of the Parish of Orleans.

Succession of LOUIS FREDERIC FOUCHER, MARQUIS DE CIRCÉ. No. 2036.

6 Civil Dist. Court of the Parish of Orleans.

Succession of Mrs. M. M. FELICIE BURTHE, MARQUISE DE CIRCÉ, Consolidated. No. 2037.

Account and Tableau of Distribution by Arthur Denis, Dative Testamentary Ex'r.

Assets.

1885.

December 21st. Received on account of award by French and American Claims Commission in claim No. 603, "Arthur Denis, test'y ex'r of L. F. Foucher, Marquis de Circé, *vs.* The United States," by sight exchange André Girod & Co., of Paris, France, on the Citizens' Bank of Louisiana, No. 2212, for forty-two thousand four hundred and thirty-one $\frac{75}{100}$ francs (fcs. 42,431.75), collected this day from Citizens' Bank at exchange, frs. 5.15$\frac{5}{8}$ ---------- 8,229 18

Foucher de Circe and wife be now consolidated, and that case No. 2037, pending before division "A," be, and is hereby, transferred to division "B" for all further proceedings to be held herein.

Division "B," Civil District Court.

Succession of L. F. FOUCHER DE CIRCE and Succession of Mrs. L. F. FOUCHER DE CIRCE. } Nos. 2036 & 2037.

Motion to Consolidate. Filed December 21st, 1885.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, Division "B."

MONDAY, *the 21st Day of December*, 1885.

Present: The Honorable W. T. Houston, judge.

Succession of L. F. FOUCHER DE CIRCE and Succession of Mrs. L. F. FOUCHER DE CIRCE. } Nos. 2036 & 2037.

On motion of Henry Chiapella, of counsel for Arthur Denis, dative testamentary executor of the successions of L. F. Foucher de Circe and of Mrs. L. F. Foucher de Circe, and on suggesting to the court that the succession of L. F. Foucher de Circe is merged into that of his wife and universal legatee, now deceased, and on further suggesting that the universal legatees of Mrs. Foucher de Circe, by representation of their said testatrix, are the sole parties in
4 interest in the succession of the said L. F. Foucher de Circe, and in the tableau of distribution which your mover is now prepared to file as dative testamentary executor aforesaid—

It is ordered by the court that the said two successions of L. F. Foucher de Circe and wife be now consolidated, and that case No. 2037, pending before division "A," be, and is hereby, transferred to division "B" for all further proceedings to be held herein.

Petition of Dative Testamentary Ex'r to File Tableau of Distribution. Filed December 23rd, 1885.

Civil District Court, Parish of Orleans, Division "B."

Succession of L. F. FOUCHER DE CIRCÉ and Mrs. L. F. FOURCER DE CIRCÉ. } No. 2036 and No. 2037.

The petition of Arthur Denis, dative testamentary executor of the successions of L. F. Foucher de Circé and of Mrs. Felicie Burthe, widow of L. F. Foucher de Circé, consolidated by order of this honorable court, of date December 21st inst., respectfully represents that he files herewith a tableau of distribution as such testamentary

executor of said consolidated successions, which he prays may be filed and advertised according to law.

5 And your petitioner further prays that after all due proceedings had that said tableau be approved and homologated and the funds ordered to be distributed in accordance therewith.

And for all further aid and relief needful in the premises.

(Signed) HENRY CHIAPELLA,
Attorney for Petitioner.

Order.

Let due and public notice be given according to law of the filing of the account and tableau of distribution by Arthur Denis, dative testamentary executor of the consolidated successions of Mr. and Mrs. L. F. Foucher de Circe.

New Orleans, December 23rd, 1885.

(Signed) W. T. HOUSTON, *Judge.*

Tableau of Distribution. Filed December 23rd, 1885.

Civil District Court, Parish Orleans, Division "B."

Succession of Mr. and Mrs. FOUCHER DE CIRCE, Consolidated. Nos. 2036 & 2037.

Civil Dist. Court of the Parish of Orleans.

Succession of LOUIS FREDERIC FOUCHER, MARQUIS DE CIRCÉ. No. 2036.

6 Civil Dist. Court of the Parish of Orleans.

Succession of Mrs. M. M. FELICIE BURTHE, MARQUISE DE CIRCÉ, Consolidated. No. 2037.

Account and Tableau of Distribution by Arthur Denis, Dative Testamentary Ex'r.

Assets.

1885.

December 21st. Received on account of award by French and American Claims Commission in claim No. 603, "Arthur Denis, test'y ex'r of L. F. Foucher, Marquis de Circe, *vs.* The United States," by sight exchange André Girod & Co., of Paris, France, on the Citizens' Bank of Louisiana, No. 2212, for forty-two thousand four hundred and thirty-one $\frac{75}{100}$ francs (fcs. 42,431.75), collected this day from Citizens' Bank at exchange, frs. 5.15⅝ 8,229 18

Liabilities.

Eusebe Bouny, notary, cost of inventory of February 4th, 1881, in succession of L. F. Foucher, Marquis de Circé	37	50
Cost of inventory of Feb. 5th, 1881, in succession of Mrs. M. M. F. Burthe, Marquise de Circé	37	50
Copies letters testamentary to Arthur Denis, in succ'ns Mr. & Mrs. Foucher de Circe, to be used in France for collection of the award	1	00
7 Legalization of same by French consulate	4	60
Benjamin Ory, notary, cost of powers of attorney by Arthur Denis, dative test'y ex'r, succ'ns Mr. & Mrs. Foucher de Circe, to Paul Louis Burthe to collect award	8	00
Legalization by French consulate	4	60
Appraisers' fees in succ'n L. F. Foucher, H'y Mallan, & L. A. Richards, each $12.50	25	00
Appraisers' fees in succession of Mrs. L. F. Foucher, R. Menstier, & C. Morel, each $12.50	25	00
Henry Chiapella & Arthur Denis for professional services and fees in claim against the United States No. 603 of French-American Claims Commission, as per contract, 15 % of $17,940, amount of award	2,691	00
	2,834	20

Distribution of $5,280.00.

To Mrs. Louise Burthe, tutrix, proportion of minor children of Edward Burthe, $\frac{1}{4}$	1,320	00
To Mrs. Louise Burthe in her own right, $\frac{1}{16}$	330	00
To Mrs. Felicie Brierre, $\frac{1}{16}$	330	00
To Delord Burthe, $\frac{1}{16}$	330	00
To Louis Burthe, $\frac{1}{16}$	330	00
To L. André Burthe, $\frac{1}{16}$	330	00
To Thos. Butler, dative tutor, proportion of minor children of Mrs. Marguerite Butler, $\frac{1}{16}$	330	00
8 To Mrs. Mary Burthe, tutrix, proportion of minor children of George Burthe, $\frac{4}{96}$	220	00
To Mrs. Marie Antoinette Burthe, daughter of George Burthe, $\frac{1}{96}$	55	00
To Miss Estelle Marguerite Burthe, daughter of George Burthe, $\frac{1}{96}$	55	00
To Miss Marie Estelle Burthe, daughter of Emanuel Burthe, $\frac{1}{32}$	165	00
To M. André Burthe, son of Emanuel Burthe, $\frac{1}{32}$	165	00
To Paul Louise Burthe, $\frac{1}{8}$	660	00
To Dominque Francois Burthe, $\frac{1}{8}$	660	00
Reserved for costs, etc.	114	98
	8,229	18

E. & O. E.
New Orleans, December 23rd, 1885.
(Signed) ARTHUR DENIS,
Dative Test'y Exec'r.

The undersigned, test'y executor, understands that the French and American Claims Commission established the uniform jurisprudence for its decisions that it could not hear and determine any claims against the United States, except those of claimants and beneficiaries who were French citizens, and that the said commission rejected all claims of persons not French citizens even when they represented the claim of a deceased French person.

9 In claim No. 603, of the succession of L. F. Foucher de Circé, the actual claimants are all American citizens except Paul Louis Burthe and Dominique Francois Burthe, who are French citizens. Under the said jurisprudence of the commission, and considering the status of the American claimants, the executor felt great doubt and hesitation as to the distribution to be made under this tableau. On the one hand it seemed as if the commission, under its rulings, could not have made any award in favor of the American claimants, and that the award as allowed must have been intended for the French claimants only; but, on the other side, the commission not having in express terms excluded the American claimants, the executor concluded, in making the tableau, to allow to the several legatees their recognized proportions of interest in the estates, leaving the French heirs to come by oppositions and assert their rights, if any they have, to the entire award.

(Signed) ARTHUR DENIS,
Dative Test'y Ex'r.

Opposition to Account and Tableau Filed January 9th, 1886.

Civil District Court, Parish of Orleans, Division "B."

Succession of L. F. FOUCHER DE CIRCE and of Mrs. L. F. FOUCHER DE CIRCE. } Nos. 2036 and 2037, Consolidated.

10 Now into court come Paul Louis Burthe and Francois Burthe, both residing in France, said parties being named upon the account and tableau hereinafter referred to, and oppose the account and tableau of distribution filed herein on or about December 23rd, 1885, by Arthur Denis, dative testamentary executor, in every item, respect, and particular, except as hereinafter set forth.

And for cause of opposition these opponents say that the amount proposed to be distributed by the said Arthur Denis, to wit, eight thousand two hundred and twenty-nine dollars and eighteen cents, less the costs, charges, and expenses of collecting the same, belongs wholly and solely to these opponents, and no part thereof belongs to the other persons named in said account and tableau.

That between 13th April, 1861, and 20th August, 1866, the late L. F. Foucher de Circe, a citizen of France, suffered damage to a large amount by and from the wrongful acts of the armies of the United States; that before any claim for compensation was made by him and before any compensation was awarded for such damage he departed this life, leaving as his universal legatee his wife,

Mrs. L. F. Foucher de Circe, named above, also a citizen of France, and said claim for damages thereby devolved upon her; that before any claim was made by her for compensation and before any compensation was awarded to her for such damage and loss she departed this life, leaving sundry legatees; that some of the legatees of said Mrs. L. F. Foucher de Circe are named upon said account and tableau, and some, having departed this life, are represented upon said account and tableau by their heirs; that said parties named upon said account and tableau, some directly and in person and others by inheritance, stand for and represent the entire
11 right, title, and interest of the estate and succession of said Mrs. L. F. Foucher de Circé, and through her the entire right, title, and interest of the estate and succession of said L. F. Foucher de Circé.

That by a treaty between the Republic of France and the United States of America, dated 15th January, 1880, and treaties supplemental thereto, there was established "The French and American Claims Commission," which was authorized to receive and pass upon "all claims on the part of corporations, companies, or private individuals, citizens of France, upon the Government of the United States arising out of the acts committed against the persons or property of citizens of France not in the service of the enemies of the United States or voluntarily giving aid and comfort to the same by the civil or military authorities of the Government of the United States upon the high seas or within the territorial jurisdiction of the United States during the period comprised between the 13th day of April, 1861, and the 20th day of August, 1866."

That when said commission was created it was supposed that the object and purpose of said commission were to ascertain and to repair and make good to all French citizens and, in case of death, to their estates and successions, heirs and legatees, independently of any question of citizenship, all such wrong and damage as such citizens had suffered from the wrong-doing of the civil or military authorities of the United States; and, such being the belief and opinion of these opponents and of said accountant, the said accountant herein, Arthur Denis, testamentary executor of said L. F. Foucher de Circe, and as such representing all the parties interested in the succession of said deceased (said parties now being represented by the persons named as distributees in said account and tableau), filed with the aforesaid commission a claim, known as claim No. 603, against the
12 United States for said damages done by the armies of the United States to the property of said L. F. Foucher de Circe.

That said commission decided and adopted as its fixed ruling and jurisprudence that no allowance could or would be made to the heirs and legatees of any person who was a French citizen at the time he suffered damage unless such heirs and legatees were also, at the time the claim for damages and loss was filed, French citizens; and said commission also decided and adopted as its fixed ruling and jurisprudence that no executor or administrator representing the estate and succession of a person who was a French citizen at the time he suffered damage could have any standing before said commission or

receive any award against the United States, except to the extent that he represented, as the beneficiaries under such award, persons who were citizens of France at the time of the filing of said claim; that said ruling and jurisprudence were and are in exact accordance with the terms of said treaties.

That said L. F. Foucher de Circé and Mrs. L. F. Foucher de Circé were French citizens, but that all persons interested in the estate and succession of said L. F. Foucher de Circe and in that of Mrs. L. F. Foucher de Circe, except these opponents (who have always been citizens of France), were, when said claim was filed and are now, citizens of the United States, and that, such being the case, under the ruling and jurisprudence of said commission and under said treaties none of such persons except these opponents were entitled or could have been entitled to make any claim against the Government of the United States before said claims commission or to have any award allowed in their — against the United States by
13 said commission for said damages, said commission having no power or authority to consider claims or make awards except for persons who were French citizens and who were such when claims for damages were filed.

That under said treaties and under the fixed ruling and jurisprudence of said commission no award could be made under said claim No. 603 except in so far as concerned these opponents; that these opponents directly intervened and took part as coplaintiffs and copetitioners in said proceeding or claim No. 603.

That in due course the said matter was taken up by the said commission, and after an examination an award was allowed for nine thousand and two hundred dollars, with interest, and the amount collected by said Arthur Denis, testamentary executor, $8,229.18, represents a part of said award.

That no award would or could have been made or allowed but for the intervention and presence in said proceedings of your opponents; that the amount of said claim presented by said Arthur Denis, executor, exceeded one hundred thousand dollars; that the share and portion of each of your opponents in the estate and succession of said L. F. Foucher de Circe is one undivided eighth.

That said award was intended and allowed for and to these opponents and to no other persons whatsoever; that no award was intended nor could be made nor was made on such claim of Arthur Denis except for these opponents, and that they are entitled to receive the entire amount awarded.

And these opponents say that as to the items charged as expenses for the collection of said award they have and make no
14 objection or opposition, and consent to the payment of the same as proposed by said testamentary executor, said items amounting to twenty-eight hundred and thirty-four dollars and twenty cents, and being fully set forth in and upon the said tableau; and these opponents agree and consent that said executor shall reserve for future costs the amount of one hundred and fourteen dollars and ninety-eight cents, as proposed by him; but they say that they are entitled to and should receive the whole amount, viz., five

thousand two hundred and eighty dollars, which the executor proposes to distribute among the different parties named in said tableau of distribution.

Wherefore opponents pray that the said account and tableau may be amended so that the whole of said amount of $5,280.00 shall be paid to your opponents, one-half to each of them, and that, as so amended, the said account and tableau be approved and homologated and the funds distributed accordingly; and opponents pray for all and general relief in the premises.

(Signed) NICHOLLS & CARROLL,
Att'ys for Opponents.

Note of Evidence for Executor. Filed February 13th, 1889.

Civil District Court, Parish of Orleans, Division "B."

Succession of L. F. FOUCHER DE CIRCE and of Mrs. L. F. FOUCHER DE CIRCE. } Nos. 2036 & 2037, Consolidated.

Note of evidence taken in open court, before the Honorable
15 Fred. D. King, judge, on the trial of the opposition of Paul Louis Burthe and Dominique Francois Burthe to the account and tableau of distribution filed herein December 23rd, 1885, taken on behalf of the executor on Thursday, February 7th, 1889.

Appearances: Henry Chiapella, for the dative testamentary executor; Charles Carroll and Henry Denis, for the opponents.

By Mr. CHIAPELLA: Counsel for the executor offers in evidence a memorial filed by Arthur Denis, dative testamentary executor of L. F. Foucher, Marquis de Circé, against the United States in the French and American Claims Commission, filed June 21st, 1881, marked "A."

It is agreed that in case of an appeal the printed memorial shall go up in the original.

It is admitted that L. F. Foucher, Marquis de Circé, died in Paris, France, in 1870, and that by his last will and testament his widow was appointed his universal legatee, and that she was put in possession of his succession by a decree of the late second district court for the parish of Orleans.

It is admitted that said Widow L. F. Foucher de Circé died in Paris, France, in 1877, and that by her last will and testament her nephews and nieces were appointed her universal legatees conjointly, and that they were put in possession of her estate by decree of the late second district court for the parish of Orleans on the 24th day of October, 1878, which judgment was affirmed by the supreme court of the State in April, 1879, and that the said legatees
16 were put in possession in the following proportions, to wit: Edmond Burthe, one-fourth, undivided; L. André Burthe, one undivided sixteenth; Mrs. Marguerite Burthe, widow of Robert O. Butler, one undivided sixteenth; Marie Estelle and Andry Burthe, jointly, one undivided thirty-second each; Marguerite Burthe, Marie

Antoinette Burthe, Maude Burthe, Victor Burthe, Adele Burthe, and Carrie Burthe, one ninety-sixth, undivided, each; Delord Burthe, one undivided sixteenth; Louis Burthe, one-sixteenth, undivided; Miss Felicie Burthe, one-sixteenth, undivided; Mrs. Louise Burthe, wife of Edmond Burthe, one-sixteenth, undivided; Paul Louis Burthe, one-eighth, undivided, and Dominique Francois Burthe, one-eighth, undivided.

It is admitted that since the date of the judgment putting said legatees in possession that Edmond Burthe and Mrs. Widow Marguerite Butler have died and left minor children, who are represented on the tableau by their tutor and tutrix respectively.

It is admitted that the first provisional account and tableau of distribution filed by Arthur Denis, executor, on May 24th, 1878; the second provisional account filed by Arthur Denis, executor, on May 14th, 1879, and the third account filed by Arthur Denis, executor, on October 9th, 1879, make a distribution of funds of the estate in accordance with the will and the judgment putting the legatees in possession, and that the parties are the same on the tableaux as on the present tableau, and their proportions are the same, except that Edmond Burthe and Mrs. Marguerite Butler had died prior to the filing of the last tableau, and their children are represented thereon by their tutor and tutrix respectively.

And it is also admitted that the funds distributed in the accounts just named were derived not under any award or judgment of any claims commission, but from the usual and ordinary administration of the estates of the deceased, by sale of property left by them
17 and actually in their possession and under their control at the time of death.

Counsel for the executor offers in evidence the affidavit of the testamentary executor attached to the present account, dated December 23rd, 1885.

Note of Evidence for Opponents. Filed February 13th, 1889.

Civil District Court, Parish of Orleans, Division "B."

Succession of L. F. FOUCHER DE CIRCE and MRS. L. F. FOUCHER DE CIRCE. } Nos. 2036 & 2037, Consolidated.

Note of evidence taken in open court, before the Honorable Fred. D. King, judge, on Thursday, February 7th, 1889, on behalf of opponents, on the trial of the opposition of Paul Louis Burthe and Dominique Francois Burthe to the account and tableau of distribution filed herein by the dative testamentary executor December 23rd, 1885.

Appearances: Charles Carroll and Henry Denis, for opponents; Henry Chiapella, for executor.

By Mr. CARROLL: Counsel for opponents offer in evidence—

1. The document marked "X Y Z," being admissions made by the attorneys in this matter, and signed by counsel on both sides.

2. The part entitled "Exhibit A" of the book entitled on the outside "French and American Claims Commission, 1880–
18 1884, final report of the counsel of the United States," the title page of which is as follows, "The final report of the agent and counsel of the United States, with treaties and schedule of claims, Washington, D. C., Gibson Brothers, printers, 1884," being the treaty which it purports to be.

And it is agreed that in case of appeal no part of said book need be copied in the transcript, but the same shall be used in the original, and either party may refer to and use said book, or any part thereof, in the same manner and with the same effect as if said book were fully copied in the transcript.

3. Pages 13 to 24, inclusive, of pamphlet entitled "Rules of the French and American Claims Commission, with the convention establishing the commission," said pamphlet marked "B."

4. Original document marked "C," being a copy of the supplemental memorial or petition filed by the above-named opponents, Paul Louis Burthe and Dominique Francois Burthe, in the proceedings taken in support of the claim against the United States for damages done by the armies of the United States to the property of L. F. Foucher de Circe, the above-named, deceased; and although said copy does not show that the original document was signed, acknowledged, and filed, it is admitted that said original document was duly signed, acknowledged, and filed, and that said document "C" is a full copy of the same, except as to dates, signatures, and acknowledgments.

5. Document "E," being a true copy of the award allowed in the proceedings taken before said commission in support of the claim made for loss and damage sustained by said L. F. Foucher de Circé.

6. Document marked "F," being a letter dated 23rd of January, 1886, to Messieurs A. and C. Denis from Honorable A. O.
19 Aldis, a member of the said French and American Claims Commission representing the United States.

7. Also copies of three letters to Mr. Arthur Denis from Alexander Porter Morse, dated January 9th, 1886; January 22nd, 1886, and January 27th, 1886, being marked, respectively, "G 1," "G 2," and "G 3," said Alexander Porter Morse being the assistant counsel of the French Republic before said French and American Claims Commission.

8. Also extracts from letters to Mr. Arthur Denis from Edward Janin, the attorney and counsel on behalf of the claimants in the matter of said claim against the United States, said letters being dated 21st November, 1881; 5th December, 1881; 3rd February, 1882; 1st April, 1882, and 26th of June, 1883, being marked "H 1," "H 2," "H 3," "H 4," "H 5," and "H 6," "H 6" being dated December 14th, 1880.

9. We also offer in evidence the printed pamphlet or brief, 58 pages, marked "D" (being a brief for the claimants), and signed by Messrs. De Chambrun, counsel for the French Republic, and Edward Janin, private counsel.

By Mr. CHIAPELLA: Counsel for the executor objects to the introduction in evidence of the letters of Mr. Commissioner Aldis, of the three letters of Mr. Alexander Porter Morse, and of the letters of Mr. Edward Janin, and also the brief filed in the case, on the ground that the decision of the said court or claims commission cannot be interpreted by testimony given after the decision, or by argument of counsel before the said commission, or by the opinion of attorneys employed in the said case.

20 By the COURT: Objection overruled.

By Mr. CHIAPELLA: To which ruling of the court counsel for the executor reserves a bill of exceptions.

By Mr. CARROLL: We offer also from this book, marked on the outside "French and American Claims Commission, 1880–'84, final report of the counsel of the United States," pages 1 to 108, inclusive, being a report of the decisions and jurisprudence of the French and American Claims Commission on questions involving citizenship before them.

By Mr. CHIAPELLA: Counsel for the executor objects to the introduction in evidence of this report of the decisions of the French and American Claims Commission on the ground that the judgment rendered in this case cannot be explained by decisions of the same court in other cases.

By the COURT: Objection overruled.

By Mr. CHIAPELLA: Counsel for the executor reserves a bill of exceptions to the ruling of the court.

It is admitted that Arthur Denis is now dative testamentary executor of the succession of the Marquis de Circé and of his wife.

And it is agreed that in case of appeal said documents "G 1," "G 2," "G 3," "H 1," "H 2," "H 3," "H 4," "H 5," and "H 6" shall not be copied in the transcript, but shall go up in the

21 original, and either party may refer to and use said documents or any of them or any part of them in evidence in the same manner and with the same effect as if said documents were fully copied in the transcript.

DOCUMENT "X Y Z." Offered by Opponents and Filed February 7th, 1889.

"*X Y Z.*"

Civil District Court, Parish of Orleans, Division "B."

Succession of L. F. FOUCHER DE CIRCE and of Mrs. L. F. FOUCHER DE CIRCE. } Nos. 2036 & 2037, "Consolidated."

On the opposition of Paul Louis Burthe and Dominique F. Burthe to the account and tableau of distribution filed herein 23rd December, 1885, by the dative executor,

Admissions.

It is admitted—

1. That between 13th April, 1861, and 20th August, 1866, the late L. F. Foucher de Circé, a citizen of France, suffered damage to a large amount by and from the wrongful acts of the armies of the United States; that before any claim for compensation was made by him and before any compensation was awarded for such damage he departed this life, leaving as his universal legatee his wife, Mrs. L. F. Foucher de Circé, named above, also a citizen of France, and said claim for damages thereby devolved upon her; that before any claim was made by her for compensation and before any com-
22 pensation was awarded to her for such damage and loss she departed this life leaving sundry legatees; that some of the legatees of said Mr. L. F. Foucher de Circe are named upon said account and tableau, and others, having departed this life, are represented upon said account and tableau by their heirs; that said parties named upon said account and tableau, some directly and in person and others by inheritance, stand for and represent the entire right, title, and interest of the estate and succession of said Mrs. L. F. Foucher de Circé, and through her the entire right, title, and interest of the estate and succession of said L. F. Foucher de Circe.

2. That the accountant herein, Arthur Denis, dative testamentary executor of said L. F. Foucher de Circé, and also of said Mrs. L. F. Foucher de Circé, and as such representing all of the parties interested in the succession of said deceased (said parties now being represented by the persons named as distributees in said account and tableau), filed with and before the French and American Claims Commission the claim known as claim No. 603 against the United States for said damage done by the armies of the United States to the property of said L. F. Foucher de Circé.

3. That Arthur Denis, in the said petition and memorial and in the proceedings taken in the prosecution of said claim, acted and appeared as dative testamentary executor of said Mr. and Mrs. L. F. Foucher de Circé, and that he also acted and appeared as the agent and attorney in fact of the above-named Paul Louis Burthe and Dominique Francois Burthe under authentic powers of attorney authorizing him to act for and represent said parties, and made part of the record in said proceeding before said commission.

23 4. That after said claim had been presented and before any judgment was rendered thereon or award allowed the above-named opponents filed as co-plaintiffs and co-petitioners in said cause a petition or memorial, of which the document marked "C" is a copy in all respects save as to signatures, dates left blank, and acknowledgments, said memorial (of which said document is a copy except as above mentioned) having been duly dated, signed, acknowledged, sworn to, and filed in said proceedings in prosecution of said claim against the United States, said petition or memorial of opponents having been filed under the rules and requirements of said commission.

5. That said L. F. Foucher de Circé and said Mrs. L. F. Foucher

de Circé were both French citizens, but that no persons interested in the succession of either of said parties were French citizens at the time said claim was filed or have been since or are now French citizens except the above-named opponents, both of whom are now and have always been citizens of France.

6. That all persons interested in the estate and succession of said L. F. Foucher de Circé and in that of Mrs. L. F. Foucher de Circé, except the above-named opponents, were when said claim was filed, have always been, and are now citizens of the United States.

7. That none of the universal legatees of the said widow Foucher and none of the parties who joined as claimants with said Arthur Denis, testamentary executor, was in the service of the enemies of the United States or ever voluntarily gave aid or comfort to the same between 13th of April, 1861, and 20th August, 1866, except Louis Burthe, who was in the service of the so-called Confederate States.

8. That said commission, in the proceedings referred to,
24 rendered an award, decree, or judgment, of which the document marked "E" is a copy, the title of the claim being given in said award as "Arthur Denis *vs.* The United States," and not "Arthur Denis, dative testamentary executor, etc., *vs.* The United States," which had been the title given to said claim up to the time of the allowance of said award.

9. That the document and letters and extracts from letters marked "F," "G 1," "G 2," "G 3," "H 1," "H 2," "H 3," "H 4," "H 5," and "H 6" are either originals or are true and correct copies of the original documents mentioned and referred to in the note of evidence offered on behalf of the above-named opponents.

10. That the book entitled on the outside "French and American Claims Commission, 1880–'84, final report of the counsel of the United States," the title-page being "The final report of the agent and counsel of the United states, with treaties and schedule of claims, Washington, D. C., Gibson Brothers, printers, 1884," is a true, correct, and official copy of the report, schedules, etc., which it purports to set forth.

And it is agreed that in case any parts or portions of said book shall be offered or admitted in evidence or in case of appeal such parts or portions shall not be copied in the transcript, but shall be used and referred to in the original (printed) form in the same manner and with the same effect as if copied in the transcript.

(Signed) HENRY CHIPELLA,
Attorney for A. Denis, Dative Test'y Ex'r.

(Signed) CHARLES CARROLL,
Att'y for Opponents, P. L. Burthe and D. F. Burthe.

25 EXHIBIT "E." "Award." Offered in evidence by opponents. Filed February 7th, 1889.

FRENCH AND AMERICAN CLAIMS COMMISSION,
1518 H STREET, WASHINGTON, *June 26th*, 1883.

ARTHUR DENIS
vs.
THE UNITED STATES. } No. 603.

We allow this claim at the sum of nine thousand and two hundred dollars, with interest, at 5%, from April 1st, 1865.

ARINOS.
A. LEFAIVRE.
A. O. ALDIS.

EXHIBIT "F." Letter of A. O. Aldis. Filed February 7th, 1889. Offered in evidence by counsel for opponents.

1765 MASS. AVE., WASHINGTON, D. C., *Jan'y 23rd*, 1886.

Messrs. A. & C. Denis, 104 Canal St., N. O.

GENTLEMEN: Y'r favor of the 16th was duly rec'd. Of course you understand without my saying it that the comm'rs of
26 the F. & A. Claims Comm'n did not assume to make any award distributing among the claimants the amount awarded. They ascertained the facts necessary to give them jurisdiction, viz., whether the claimants were French citizens and what amount (if any) such French citizens were entitled to. If any of the claimants were not French citizens, then, of course, their shares (if any) were not allowed.

In this case the counsel for the claimants admitted in their brief that only two of the claimants were French citizens (see page 58 of the brief), and asked for an allowance only for their shares ($\frac{1}{8}$th each) or one-quarter for both.

The award, of course, would not allow more than what the claimants, by their counsel, asked for, nor would the award allow for the shares of parties joined as claimants, but who, it was admitted on the hearing, were not entitled to any allowance.

I have no doubt but that we intended to include in our award only the shares of the two claimants who were French citizens—Paul Louis Burthe and Dominique Francois Burthe.

As my colleagues are not here I cannot ask them the question you put to me and cannot speak for them.

I am, very respectfully,

(Signed) A. O. ALDIS.

EXHIBIT "G." Letter of Alex. Porter Morse. Offered in evidence by counsel for opponents. Filed February 7th, 1889.

27 *In the Matter of the Award of the French and American Claims Commission (Treaty 15th Jan., 1880), in favor of A. Denis, Executor of Foucher H'rs,* vs. *The United States.*

WASHINGTON, D. C., *Jan. 9th,* 1886.

Arthur Denis, Esq., P. O. box 1719, New Orleans.

DEAR SIR: 1. In reply to yours of the 29th Dec., 1885, in respect of above I beg leave to inform you that I, as counsel on the part of the French Republic before the French and American Claims Commission, argued the cause of Arthur Denis (executor of Foucher, etc.) *vs.* The U. S. (No. 603), on behalf of claimant, and that my recollection and understanding was that the award made by the commissioners for the sum of nine thousand two hundred dollars (9,200) and interest from April 1st, 1865, was solely on account of the interest of the French claimant and beneficiaries, as it appeared in proof, the counsel of the United States insisting in that and in all other cases that the commission had no jurisdiction to make awards in favor of claimants who were citizens of the United States, and this was, so far as I am advised, the uniform usage and practice of the commission.

2. The Department of State contains the archives of the commission, and some day early next week I will obtain a certified copy, as requested, of so much of the record in A. Denis (ex. of Foucher) *vs.* The U. S. as may be of value to you.

3. I will also endeavor to forward to your address copy of
28 the report of Mr. Boutwell, agent for the United States.

4. The address of Judge Aldis is 1765 Mass. Ave., Washington. I know him quite well, and I would cheerfully converse or interrogate him on the subject if you desire me to do so.

5. If the controversy between the American and the French beneficiaries comes to serious issue in the courts I would cheerfully co-operate with you, if retained professionally, in securing evidence and in arguing the cause before your courts.

It seems to me that the American heirs have a more immediate and appropriate remedy elsewhere, to which they will be obliged finally to resort, and if the time should come that they would desire my professional assistance my services would be at their disposal. "The American claimants" should remember that the award to you, as executor of Foucher, represents only Foucher's French interest. The balance is due to them and "should eventually be paid by the United States to them" or to their heirs.

Yours, very respectfully,

(Signed) ALEX. PORTER MORSE.

P. S.—When I shall have examined the records of the commission I will be in position to advise you what fee I shall expect, as

also what costs are incident to the certification of any papers that may be required by you.

Y'rs, A. P. M.

EXHIBIT "G 2." Offered by counsel for opponents as evidence. Filed February 7th, 1889.

29 *In the Matter of the Award by Franco-American Claims Commission, 1880–1884, in Favor of Arthur Denis, Executor of Foucher, Marquis de Circé.*

WASHINGTON, D. C., *Jan. 22nd*, 1886.

Arthur Denis, Esq., New Orleans.

DEAR SIR: In reply to yours of the 18th touching above, I take pleasure in forwarding to you this day copy of Boutwell's report. You will find at pp. 89–92 brief and rather unsatisfactory mention of above case.

I will at once enter upon a close examination of the whole record of the case in the archives of the Department of State and send you report touching same at an early day. Meanwhile, acting upon your suggestion as to fee, you may send me check for fifty dollars (50.00) on account.

The remedy for the minor heirs of Foucher, who, if a citizen of the United States, was presumably loyal, which I had in mind, is by petition to Congress, asking the Congress to give the Court of Claims power and jurisdiction over their unadjusted proportionate interest in the claim of the Foucher Estate against The United States and making the evidence of fact taken before the French claims commission as to the subject-matter evidence in the Court of Claims.

Mr. Edward Janin appears to be comfortable, but is not able to give any attention to business.

30 Yours truly,

(Signed) ALEX. PORTER MORSE.

EXHIBIT "G 3." Offered in evidence by counsel for opponents. Filed February 7th, 1889.

In the Matter of the Award ("Foucher, Marquis de Circé") in No. 603, *Arthur Denis* vs. *The United States (made by the French and American Claims Commission*, 1880–1884).

WASHINGTON, D. C., *Jan. 27th*, 1886.

Arthur Denis, Esq., post-office box 1719, New Orleans.

DEAR SIR: I transmit herewith certified copies of records in No. 603, Arthur Denis *vs.* The U. S., from the archives of the Department of State.

They demonstrate the correctness of my recollection and opinion

as to the pleadings and conclusion of the commissioners, fully set forth and expressed in my letter to you of the 9th of Jan.

These extracts show that M. de Chambrun, counsel for the French Republic, and Mr. Edward Janin, private counsel, only maintained the claim for the share of such of the heirs of Foucher as were
31 citizens of France; but to make this conclusion more definite why do you not, if any proceedings in court have been or are to be instituted, send forward a commission to take the deposition without further delay of Mr. ex-Commissioner Aldis on this point? He will, I have no doubt, testify that the commissioners only made an award to cover the share or interest of the French citizens—in a word, that the award of $9,200 and interest was on account of the one-fourth interest represented by Paul Louis Burthe and Dominique Francois Burthe. The three-fourths of the claim remains in the heirs, who are citizens of the United States. This is a subsisting claim against the United States which the American heirs should at once bring to the attention of Congress by filing a petition asking its reference and adjudication of the Court of Claims. If, however, the American heirs should presently lay claim to any portions of the award made by the French and American Claims Commission in respect to the interests represented by heirs who are citizens of France, it might be considered an abandonment or waiver of the three-fourths remaining. Such action would seem to recall the fable of the dog and his bone in the river. It would, would it not, be a case of dropping "the substance to catch at the shadow?"

I shall be glad to hear from you on receipt of this. Mr. Janin expects to be in Washington to-morrow for a day; but he is not able to attend to business.

Very truly y'rs,
(Signed) ALEX. PORTER MORSE.

P. S.—As the case of Archbishop Perche, decided before Foucher claim was reached, had held that even a French citizen by
32 birth who, since the date of the treaty, has become naturalized as a citizen of the United States had no standing before the commission, Mr. Edward Janin & the counsel of the French Republic, however much they may have desired to do, could not then contend that the heirs of Foucher, who were citizens of the United States, had standing before the commission as claimants or beneficiaries.

A. P. M.

Exhibit "H 1." Offered in evidence by counsel for opponents. Filed February 7th, 1889.

Copy.

WASHINGTON, *Nov.* 21*st*, 1881.

Arthur Denis, Esqr., 104 Canal St., New Orleans.

DEAR SIR: I think our case would stand thoroughly proved for a very respectable award if the commission would only be reasonable

and follow the precedents in considering the claim as the claim of the estate of Foucher and the nationality of the present beneficiaries as of no consequence.

There are no new developments as to the position the commission will finally take on this point. The question, however, is to be argued again, and in the meantime no opinion involving that point will be delivered.

33 A full and thoroughly good brief on these questions has been presented to the French counsel by Carlyle & McPherson, who have a case involving them and which is now before the commission for decision. Last Saturday the commission ordered that this brief be translated at the expense of the fund for the expenses of the commission; that is, translated into French. It will then be printed in both languages.

The result of the new argument may be more or less favorable to to us; at all events the decision in the case of Carlyle and McPherson will probable show us clearly the final position of the commission.

If the commission shall persist in requiring that the present beneficiaries shall be shown to be French citizens we may not be able to recover for more than the $\frac{1}{4}$ share of Paul Louis Burthe and Dominique Francois Burthe. I shall, however, make a vigorous attempt to bring in the $\frac{1}{4}$ interest of Edward Burthe's children and the $\frac{1}{16}$ interest of Laurent Andre Burthe on the score, as to the latter, of his having been at St. Cyr and in the French army.

It is true he voted in Louisiana; but it does not necessarily follow that in doing so he claimed to be an American citizen. In many of the States a foreigner becomes entitled to vote by a short residence in that State and totally irrespective of the question whether or not he is a citizen of the United States.

It is a pity it does not appear more distinctly that Edmund Burthe resumed French nationality by the fact of returning

34 to France with the intention of so doing.

I think it is not shown how long he remained in France before dying there.

The question whether or not there is any chance at all for the other heirs may depend upon the views the commission shall take as to the French law of citizenship and of the effect of the 14th amendment upon American citizenship.

But probably their chances are almost null, unless the commission shall come to consider the claim as entirely the claim of Foucher's estate and the nationality of the present beneficiaries as of no moment.

How large an award should we insist upon in our brief? Evidence in our favor, furnished by the United States, will come with many times more weight than the evidence we ourselves produce. The commission will certainly not allow the amounts of Ross' estimates. They may be perfectly fair, but the commission will think them exaggerated. Besides, Ross makes no allowance for the fact that a new building is worth more than the building exactly similar which it replaces. Again, his estimates are of the cost to rebuild.

The commission may reasonably say that the cost in 1864 of rebuilding was much greater than it should be now; that the value to the brick yard of the fine dwelling-house was very much less than the cost of rebuilding the house; that you have sold the premises for a city park, and that the buildings, if standing at the time of sale, would have added nothing to the price, etc., etc. I do not say that this reasoning would be correct, but I do say I am sure the commission would make it.

35 The evidence shows that the main purpose of the demolition was to make room for the new United States buildings, and not to procure materials. That the value of the use as materials was very small, for as to the bricks used—that is, the bricks already burned and fit for use in building—it will be imprudent to claim for them, because they will be supposed to have belonged, not to Foucher but to Choppin. The point I am leading up to is that perhaps it would be well to take Canby's report as, in a considerable measure, though not entirely, the guide to the amount of damages we should ask in our brief. While doing so we could, with only a slight departure from Canby's propositions, make our demand very nearly as much as $40,000, with 6 % interest per annum from, say, June 1st, 1866, to the close of the commission, which last period may be still several years off. It must be remembered that everything will be at the discretion of the commissioners. "C'est nous qui faisons le droit," says d'Arinos. They will be much more apt to allow interest upon a small award than upon one large in principal.

Again, if the commission will adhere to its present theories about the interpretation of the treaty and confine its award to the interests of those of the present beneficiaries that shall be shown to be French citizens, they might be much more apt to make an allowance for the ¼ interest of the children of Edmond Burthe and the $\frac{1}{16}$ of Laurent Andre Burthe, if they were asked to make only a moderate estimate of damages, than if we insisted on a very large one.

36 Looking at Canby's report, evidence, p. 59, it will be seen that he says:

"It should be regarded, therefore, as private property taken for public use, and that the owner is entitled to just compensation for that use from the date March 5th, 1864, of this occupation."

He rejects compensation for occupation anterior to March 5th, 1864.

He next adopts the recommendation of the quartermaster, viz., to allow $20,000, in full for—

1st. Rent from March 5th, 1864, to June 30th, 1865.

2nd. Damages by destruction of building.

In addition Canby proposes an allowance as rent subsequent to June 30th, 1865, of 8 % of the assessed value of the property—not 8 % per annum, but 8 % computed once. What is the "assessed value" of the property upon which this 8 % is to be calculated? He, Canby, states it a little below, as follows: The assessed value of the entire plantation in 1864 was $175,000. Now, 8 % of $175,000 is $14,000. Add this to 20,000, and the sum is $34,000—is what Canby himself proposed to allow.

But, even accepting Canby's estimate of values as correct, it is evident that the allowance should be greater, as follows:

This report is dated January 26th, 1866, and this allowance of $14,000 is proposed by him in lieu of rent from June 30th, 1865, to the date of his report. The lease to the United States was not made until four months later, viz., June 1st, 1866. This lease was
37 at a rent of $450 per month, equal for four months to $1,800.

Add, therefore, to $34,000 the sum of $1,800 for four months' rent, from the date of Canby's report to the date of the lease, and the sum is $35,800. On so moderate a demand as $35,800 I should fully expect the commission to allow interest, and they might let in the interest of Edmond Burthe's children and of L. A. Burthe. I should, however, ask something still more. As above stated, Canby rejects all claim for occupation between May 2nd, 1862, date of capture of the city, and March 5th, 1864. Certainly we show no ground for demand of rent prior to the dispossession of our tenant Chopin, but I can see no ground for refusing compensation from October 19th, 1862, to March 5th, 1864, at at least $250 per month, say, for sixteen months, $4,000, which, added to $35,800, would come to $39,800. We will show in support of this last part of our claim that under Butler's proclamation and the decision and opinion of the Supreme Court in the case of the "Venice," New Orleans was from the time of his capture completely restored to the Union, and property therein and within its environs completely entitled to protection, and that if it was used for public purposes compensation is due to the owner.

For my part, looking at the matter broadly, I don't believe the commission would allow us more than $40,000 principal anyhow.

Hoping to hear from you shortly, I remain,

Yours very truly,

(Signed) EDWARD JANIN,
Room 31, *Corcoran Building.*

38 EXHIBIT "H 2." Offered in evidence by counsel for opponents. Filed February 7th, 1889.

(Copy.)

WASHINGTON, *December 5th*, 1881.

Arthur Denis, Esq., 104 Canal street, New Orleans.

DEAR SIR: I have just received your two letters of November 30th and December 1st.

I agree with you that, while bringing into clear prominence the amount of damages we are entitled to under Canby's report, we need not leave out of sight the fact which would on general principles be probable—the fact that Canby allows too little, and that under the evidence we have taken we ought to have more. Indeed, your ideas are not substantially different from those I intended to express.

As to Edmond Burthe, there is some evidence in the deposition of L. A. Burthe—see evidence, p. 222—tending to show that Edmond

had gone to France with the intention of settling there. This evidence, however, is very slight. We must, no doubt, resign ourselves to giving up the attempt to maintain it as a fact proved that Edmond Burthe became a French citizen by process of removal and settlement.

Yours very truly,
(Signed) EDWARD JANIN.

39 EXHIBIT "H 3." Offered in evidence by counsel for opponents. Filed February 7th, 1889.

(Copy.)

WASHINGTON, *February* 3*d*, 1882.

Arthur Denis, Esq., 104 Canal St., New Orleans.

DEAR SIR: I note that Mr. Chiapella is preparing a brief on the point that since only the representatives of one-fourth of the Foucher claim are French citizens an award ought to be made to those French citizens for the whole amount of the damages. Mr. de Geoffroy has discussed that question on page 6 of his dissenting opinion in the case of Wiltz, public administrator, *v.* U. S. I send a copy of that opinion herewith. Luckily, we have avoided all possible question about whether our claim was presented in the name of the proper claimants by "joining" the heirs as claimants.

Yours very truly,
(Signed) EDWARD JANIN.

EXHIBIT "H 4." Offered in evidence by counsel for opponents. Filed February 7th, 1889.

(Copy.)

40 WASHINGTON, *April* 1*st*, 1882.

A. Denis, Esq., 104 Canal St., New Orleans.

DEAR SIR: I have yours of March 29th. As to the question whether Boutwell has succeeded in making the evidence of which I sent you printed copy our evidence, I can only say that in the first place there is much of it whose existence I never knew of and therefore never called for; and, next, that practically it will make no difference before the commissioners who called for it. They do not act as a court would. As long as the evidence is there the commission will, if they like, consider it without the slightest reference as to who filed it. I have always believed and still believe that anything in our favor coming from an official source would have ten times as much weight with the commission as anything coming from our own side.

Yours truly,
(Signed) EDWARD JANIN.

P. S.—I have received the affidavit of the two French Burthes.

41 EXHIBIT "H 5." Offered in evidence by counsel for opponents. Filed February 7th, 1889.

(Copy.)

WASHINGTON, *June 26th*, 1883.

Arthur Denis, Esq., 104 Canal St., New Orleans.

DEAR SIR: As I have just now telegraphed you, the commission has allowed us $9,200, with interest at 5% per annum from April 1st, 1865. Why this exact sum was selected or this exact date for the commencement of the running of interest does not clearly appear. But for the cutting off of ¾ for the interest of the American heirs our award would have been $36,800 with interest. I had hardly hoped for so much as we have got, and considering all the circumstances I hope you will not be surprised.

There never was an international commission so difficult to deal with or so illiberal as this. In your case we could not probably have got a dollar but for Canby's report.

Yours very truly,

(Signed) EDWARD JANIN,
Room 31, *Corcoran Building.*

42 DOCUMENT "C." Affidavit of P. L. & D. F. Burthe. Offered in evidence by counsel for opponents. Filed February 7th, 1889.

Before the French and American Claims Commission, established under the Treaty of Jan. 15, 1880.

ARTHUR DENIS, Dative Testamentary Executor of L. F. Foucher, Marquis de Circé, Deceased,
against
THE UNITED STATES.

REPUBLIQUE OF FRANCE, CITY OF PARIS,
CONSULATE GENERAL OF THE UNITED STATES.

On this — day of ——, A. D. eighteen hundred and eighty-two, before me, the undersigned official, personally appeared Paul Louis Burthe and Dominique Francois Burthe, who, being by me first duly sworn, did each for himself depose and say:

That they are the sons of Henry Burthe, a brother of the wife and universal legatee of L. F. Foucher, upon injury to whose property in Louisiana this claim is founded; that they were and are the natural heirs of Marie Margueritte Felicie Burthe, the widow of Louis F. Foucher, to whom she had been married under the laws of the State of Louisiana, for one-fourth (or one-eighth each) of her property, which included this claim which had been left to her by her husband; that they were also made her legatees for
43 one-fourth (or one-eighth each) of all her property, including this claim.

That they are citizens of France and resident there, and were such citizens of France at the date of said treaty, Jan. 15, 1880, and that they have never been naturalized or taken steps towards being naturalized citizens of any other country than France; that the said claim, which has been filed before the commission in the name of Arthur Denis, executor, was filed with their knowledge, consent, and approbation, and for their benefit and the benefit of any others of the heirs and legatees of Madame Foucher who might be found entitled to any portion of the award hoped for.

That though the memorial on said claim is entitled in the name of Arthur Denis, dative testamentary executor of L. F. Foucher, dec'd, yet the said Denis declares therein that he "joins with him as claimants the persons hereinafter named, in whom now exists the right to said claim and to the award herein prayed for against the United States of America," and that on pages 15 to 21 of the said memorial he sets out the names, place and date of birth, the residence and post-office address of all the heirs and legatees of said Madame Foucher, and on page 16 he formally declares "they are joined in this memorial as claimants, those who are unemancipated minors being represented by their tutors or tutrixes."

That the said Denis further averred as follows on page 20 of said memorial: "Claimant explains that he does not insert at the beginning of this memorial the names of the claimants joined because he supposes that an award in favor of this claim would be
44 made to him as executor of the estate of the said Louis Frederic Foucher, Marquis de Circé, deceased, the French citizen who was the original sufferer from the injuries complained of."

That on page 16 of said memorial the said Denis names these affiants in the following words as among the legatees of Madame Foucher who are "joined as claimants," viz:

"2nd. Paul Louis Berthe, born in New Orleans, La., on or about the 9th of November, 1848; heir and legatee of the widow Foucher for two-sixteenths; is a French citizen and an elector in France, duly registered on the electoral list of the first arrondissement" of Paris, France; residence, domicile, and post-office address, No. 14 Rue Duphot, Paris, France.

"3rd. Dominique Francois Burthe, a brother of Paul Louis Burthe, born in France in 1852; heir and legatee of the widow Foucher for two-sixteenths; is also a French citizen and an officer in the French army, to wit, lieutenant in the 24th Regiment of Dragoons; residence, domicile, and post-office address, No. 14 Rue Duphot, Paris, France."

That further it is stated on page 19 of the memorial "that none of the universal legatees of the said widow Foucher and none of the parties herein joined as claimants were in the service of the enemies of the United States, and never voluntarily gave aid and comfort to the same between the 13th of April, 1861, and 20th of August, 1866, except Louis Berthe (not the affiant, Paul Louis Burthe), who was engaged and took part in the war of the
45 rebellion against the United States, and was in the service of the so-called Confederate States."

Affiant further says that the memorial was filed in the name of said Denis, as executor, under the impression that under the regulations of the commission that was the proper way to file the same for the benefit of the said heirs and legatees, including the affiants; that recently, however, the commission appears to have decided that the real claimants in such a case as this are the heirs or other persons who were the beneficial owners of the claim and were French citizens at the date of the said treaty, and that such realclaimants must not only appear in the memorial as required by the regulations, but must present their claim themselves.

That inasmuch as these affiants are the only ones among the heirs and legatees of Madame Foucher who were French citizens at the date of said treaty, and it may be considered by the commission that their claim was not presented by themselves, but it was only presented by the said executor for them and for their benefit, affiants deem it prudent to now come forward and present their claim themselves.

Wherefore the said Paul Louis Burthe and Dominique Francois Burthe declare that they ratify the presentation of said claim which was made for their benefit and that of the other said legatees, though it was not, perhaps, a present action by themselves; that they adopt the statements contained in said memorial, and aver the same to be true, to the best of their knowledge and belief. They aver
46 upon their oath that they were French citizens at the date of said treaty and are so still; that they were never naturalized or took steps towards being naturalized citizens of any other country than France, and that they never gave aid or comfort to the enemies of the United States; and they ask that the amount claimed in said memorial may be awarded to them to such extent thereof or to the extent of the whole thereof as may to this commission seem right and proper.

DOCUMENT "H 6." Letter of Edouard Janin to Arthur Denis. Offered in evidence by counsel for opponents. Filed February 7th, 1889.

Claim of M. Foucher de Circé.

I think that at least one of the parties claimants in this matter ought to be an executor or administrator of the original claimant.

I think so both on grounds arising from what may be supposed to be the disposition and sentiments of the French Government and on grounds arising from the law and interest of the United States, against whom an award is sought.

Of course, the interpretation of the regulations is to be governed by both of these considerations, as they were devised by representatives of both these two *considerations*.

First. As to the disposition and sentiments of France in
47 these matters, I cannot conceive on what principle France can consider herself called upon or the U. S. can consider France justified in prosecuting these claims, except in the interest of a French citizen. If the original French claimant is living and

has not assigned his claim, the case is clear. But suppose he has assigned the claim to a German or American, or that he is dead and the claim now belongs to an American or German legatee or heir. Even in such cases it may be considered to be for the interest of the Frenchman or of his succession (which represents him) that his assignment or his will or the devolution of the right to his natural heirs should be made effectual, even though the present beneficiary be not a Frenchman. But on that principle can the present beneficiary, if not a Frenchman, call upon France to intervene? France would very likely say to him, "You ask us to prosecute this claim for your immediate benefit on the ground that you derived your right from an original French claimant, and that it is for his honor and interest that the claim shall be paid to the present owner, whatever be the latter's nationality. Since, then, you call for an intervention on the ground of the honor and interest of the original French claimant, let him ask and call for our intervention if he still lives, or, if he be dead, let his personal representative call upon us. Otherwise we shall be in the position of prosecuting against the United States claims which no citizen of France calls upon us to prosecute."

The requirement seems even more imperative in view of
48 the law and interest of the United States, against whom an award is sought.

The act of Congress of Feb. 26, 1853 (10 Stat. L., 170), forbids the assignment of any claim against the Government, "however arising and wherever and whenever presented." (United States *v.* Gillis, 95 U. S., 407.)

The effect of this statute is not to nullify assignments of claims against the Government, but to force the prosecution of such claims solely in the name of the original claimant. It is simply an enactment as respects claims against the Government of the old common-law rule against the assignment of most "choses in action," and compelling the assignor's appearance as plaintiff in any suit upon them. One effect of this rule was that the defendant could set off any counter-claim he might have against the assignor in a suit brought in the name of the latter, but in the interest of the assignee.

The United States will have a similar right in case of an award upon this claim.

An act of Congress of 1875 expressly authorizes the deduction from any judgment or award against the United States of the amount of any claim the U. S. may have against the claimant.

It may be said that the U. S. can enforce the right even though the original claimant does not appear as claimant in person or by his personal representative, since the assignee or legatee or heir would have, at any rate, to show how he acquired his right.
49 But the common law, and the act of 1853 following it, considered that the defendant against the claim had a right to require that the original claimant's name should appear formally at the head of the papers, and that the prosecution of the claim should lie in his name, and there is no room for speculation as to

how far this was absolutely necessary as a preservation of the Government's right of set-off. It is a case where the law is positive.

And I do not see anything so entirely clear and distinct in the confused regulations as to make it safe or at least prudent to neglect the law.

The regulations prescribe that the heirs must appear.

This requirement must refer to the heirs of the original claimant and to his natural heirs, not to his legatees nor to the legatees of some one else.

If, however, the present owners of the claim, though they acquired their right by legacy, be the same persons who, in absence of a will by the original claimant, would now be his heirs, a third observance of the regulations would or might seem to require that they, too, must appear.

At all events they may appear, for the regulations expressly provide that "all persons" having any beneficial interest in the award may be joined as claimants.

The regulations also prescribe that "if there be a widow," she must appear; otherwise, her share will not be allowed.

This regulation must contemplate a widow living at the time of filing the memorial.

50 Possibly, however, the provision as to the widow's portion not being allowed may be held hereafter to apply to a case where the widow, being legatee of the claim, has herself left it by will to parties who now are entitled to the benefit of it; and so it may be prudent that the executor of the widow should appear.

The depositions taken from the court files, and which relate to the French nationality of M. Foucher, will not probably be considered as evidence strictly speaking.

But they will be respected as the opinions of jurists upon a question of French law. And the opinion of Judge Manning will be respected in the same light.

The commission being a mixed French and American tribunal, a point of French law will not be there considered as a fact to be proved by evidence like any other fact. The opinions of French jurists will be considered evidence of it. After reaching Washington I may be able to correct the views above expressed in some or many particulars.

(Signed) EDWARD JANIN.

Dec. 14, 1880.

To Arthur Denis, Esqr.

51 "*Opinion.*" *Filed February 15th*, 1887.

Division "E," Civil District Court, Parish of Orleans.

Successions of LOUIS F. FOUCHER, MARQUIS DE CIRCE, & MARQUISE DE CIRCE. Nos. 2036 and 2037.

Arthur Denis, dative testamentary executor of the successions of the Marquis and Marquise de Circé, filed his final account. He has

placed thereon the sum of five thousand two hundred and eighty dollars, received on account of an award made by the French and American Claims Commission to him, as executor of the Marquis de Circé. This sum the executor distributes among all the heirs and legatees of the two successions, whether or not they are citizens of the Republic of France or the State of Louisiana. The account is opposed by Paul Louis Burthe and Francois Burthe, citizens of the Republic of France, legatees of the deceased, claiming that the said sum of $5,280.00 is due to them alone and should not be divided between them and the other heirs and legatees, who are all citizens of the State of Louisiana.

The facts giving rise to this controversy are as follows:

52 L. F. Foucher, Marquis de Circé, a citizen of France, died in Paris in 1870. He made his widow, likewise a French citizen, his universal legatee. She was placed in possession of his estate. Widow L. F. Foucher de Circé died in Paris, France, in 1877. She left no children. By her last will and testament her nephews and nieces were appointed her universal legatees conjointly, and were placed in possession of her estate on the 24th day of October, 1878. The nephews and nieces residing in Louisiana are the minor children of Edmond Burthe, now represented by their mother and tutrix, Mrs. Louise Burthe, L. Andre Burthe, the minor children of Mrs. Marguerite Burthe, represented by their tutor and tutrix, Thomas Butler, Mrs. Mary Butler, Marie Estelle Burthe, Andre Burthe, Marguerite Burthe, Marie Antoinette Burthe, Delord Burthe, Louis Burthe, Felicie Burthe, and Louise Burthe.

The opponents, Paul Louis Burthe aud Francoise Burthe, nephews, reside in the Republic of France.

By a treaty between the Republic of France and the United States, dated 15th of January, 1880, there was established in Washington, D. C., "The French and American Claims Commission." The commission was authorized by articles 1 and 2 of the treaty "to examine and decide upon all claims on the part of corporations, companies, or private individuals, citizens of France, upon the Government of the United States arising out of the acts committed against

53 the persons or property of citizens of France not in the service of the enemies of the United States or voluntarily giving aid and comfort to the same by the civil or military authorities of the Government of the United States upon the high seas or within the territorial jurisdiction of the United States during the period comprised between the 13th day of April, 1861, and the 20th day of August, 1866."

Before this "claims commission" Arthur Denis, in his capacity as dative testamentary executor of the succession of L. F. Foucher, Marquis de Circé, filed a petition or memorial on June 21st, 1881, numbered 603, on behalf and representing all of the parties interested in the succession of said deceased, claiming from the United States Government the sum of $101,999.00, the value of house, contents, brick yard, etc., belonging to the deceased, situated in this city, and taken possession of by the United States authorities on October 17th, 1862.

Afterwards Paul Louis Burthe and Francois Burthe, through their authorized agent, Arthur Denis, directly intervened in said suit and took part as co-plaintiffs, alleging their citizenship and claiming to be entitled to one-eighth each of said claim.

On June 26th, 1883, the Court of Claims made an award in said case in these words, to wit:

54 ARTHUR DENIS
vs.
THE UNITED STATES. } No. 603.

"We allow this claim at the sum of nine thousand and two hundred dollars, with interest at 5% from April 1st, 1865."

Parol evidence proves that this award was made to the opponents alone. This award counsel for the executor contends is a final judgment in favor of the succession; that the executor received the amount thereof as succession property, and that he must distribute it among all the heirs and legatees under the laws of Louisiana and in accordance with the will of the Marquis de Circé.

It does not appear from the award whether it is in favor of Arthur Denis, executor of the succession, or in favor of Arthur Denis, agent for Paul Louis Burthe and Francois Burthe, legatees, citizens of France.

It is simply an award against the Government of the United States on the validity of the claim and the amount of damages sustained.

In order to ascertain for whose benefit the award was made it is necessary to examine the pleadings before the Court of Claims, their jurisdiction and power under the treaty, and the intent and purposes of the treaty.

From the pleadings it appears that American citizens were claimants as legatees of a Frenchman. The Court of Claims had
55 jurisdiction to examine and decide upon all claims on the part of corporations, companies, or private individuals, citizens of France, upon the Government of the United States. Their decision within the scope of this authority is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount — their award, it is not re-examinable.

The parties must abide by it as the decree of a competent tribunal or [of] exclusive jurisdiction. When the award is made, if it does not specify a name, the party for whose benefit it was rendered, the true owner, the beneficiary, can explain and prove by any legal evidence in the established courts his title to the fund.

That the judgment was rendered on the petition and in favor of a French citizen against the United States and not in favor of an American citizen against the United States. 1 Peters, 193; 5 Peters, 675; 14 Peters, 95; 17 Howard, 614; 39 A. R., 443; 7 A. R., 111; Freeman on Judgments, X, 175.

The intent and purpose of the treaty was to indemnify French citizens with the money of the United States for injuries arising out of acts committed against their property or persons by the United States; not to indemnify citizens of the United States over whom

France had no control and to whom France was under no obligation to protect and from whom France derives no corresponding obligation or benefit with the money of the United States for injuries arising out of acts committed by the United States.

56 The intent and purpose of the convention is further explained by the decision of the Court of Claims. They say: "We think it is not enough that the deceased was a French citizen when he suffered the loss and when he died and that his administrator presents the claim. It should further appear that the real and beneficial claimants who will ultimately receive the amount that may be allowed are French citizens, and they must appear and present their claims."

"This appears to us to be the plain meaning of the first and second articles of the convention. They do not, in our judgment, admit of any other construction."

Considering the pleadings in this case, the evidence, the jurisdiction of the Court of Claims, and the intent and purpose of the treaty, the court is of the opinion that the award is not a final judgment in favor of the succession, but in favor of the opponents, citizens of France, for whose benefit it was rendered. The opposition is maintained.

Judgment.

Civil District Court, Division "B."

Successions of LOUIS F. FOUCHER, MARQUIS DE CIRCE, & Mrs. M. M. FOUCHER, MARQUISE DE CIRCE. Nos. 2036 & 2037.

57 For the reasons assigned in the written opinion of the court this day delivered and filed—

It is ordered, adjudged, and decreed that the opposition filed herein be maintained and accordingly there be judgment in favor of the opponents, Paul Louis Burthe and Francois Burthe, and against the dative testamentary executor, Arthur Denis; that the account and tableau of distribution filed December 23rd, 1885, be amended so that the amount of five thousand two hundred and eighty ($5,280.00) dollars be paid to opponents—one-half to each of them—and that as so amended the said account and tableau be approved and homologated and the funds distributed accordingly.

Judgment rendered February 15th, 1889.

Judgment signed February 21st, 1889.

(Signed) FRED. D. KING, *Judge.*

Motion and Order for Suspensive Appeal & Extract from the Minutes of February 27th, 1889. Filed February 27th, 1889.

Civil District Court, Division "B," Parish of Orleans.

Succession of L. F. FOUCHER DE CIRCE and of Mrs. L. F. FOUCHER DE CIRCE. } Nos. 2036 & 2037, Consolidated.

Present: Hon. Fred. D. King, judge.

On motion of Henry Chiapella, of counsel for Arthur
58 Denis, dative testamentary executor of the successions of L. F. Foucher de Circé and Mrs. L. F. Foucher de Circé, consolidated, and also of counsel for the following heirs and universal legatees of said Mr. and Mrs. L. F. Foucher de Circé, distributees on the account and tableau filed by said dative testamentary executor, viz:

1st, Mrs. Louise Burthe, individually and as tutrix of her minor children; 2nd, Louis Burthe; 3rd, Delord Burthe; 4th, L. Andre Burthe; 5th, Mrs. Felicie Brierre, *née* Burthe, and Maurice E. Brierre, her husband, to assist and authorize her, all of this city; 6th, Thomas Butler, as dative tutor of the minor children of the late Mrs. Marguerite O. Butler, *née* Burthe, and of Robert O. Butler, both deceased, said tutor and minors residing in West Feliciana parish; 7th, Louise Butler, of full age of majority, residing in West Feliciana parish; 8th, Marie Estelle Burthe, of full age of majority, residing in State of Virginia; 9th, Andre Burthe, a duly emancipated minor, residing in State of Virginia; 10th, Mrs. Widow F. Geo. Burthe, as tutrix of her minor children and residing with them in the State of Virginia; 11th, Marguerite Burthe, of full age of majority, residing in Virginia; 12th, Antoinette Burthe; 13th, Maude Burth; 14th, Victor Burthe, duly emancipated minors, residing in the State of Virginia, and on suggesting to the court that there is error to their prejudice in and that they are aggrieved by the final judgment herein rendered on February fifteenth, 1889, and signed on February the twenty-first, 1889, maintaining the oppositions of P. L. and D. F. Burthe and amending the tableau filed by the testamentary executor herein, and that your movers desire to appeal suspensively from said final judgment to the supreme court of the State;

59 And on further suggesting that movers, Louis Burthe, Mrs. Louise Burthe, widow and tutrix, and individually; Delord Burthe, L. Andre Burthe, Mrs. Felicie Brierre *née* Burthe, and Maurice E. Brierre, her husband; Thomas Butler, dative tutor; Louise Butler, Marie Estelle Burthe, Andre Burthe, Mrs. Widow F. George Burthe, tutrix; Marguerite Burthe, Antoinette Burthe, Maude Burthe, and Victor Burthe, are interested in obtaining a reversal of said final judgment, which excludes them from participation in the fund distributed by the said dative testamentary executor—

It is ordered by the court that movers be granted a suspensive appeal from said final judgment, returnable to the supreme court of the State on its return day, viz., on the third Monday of March, 1889,

on giving bond in the sum of one hundred and fifty dollars, with good and solvent security and according to law.

Appeal Bond. Filed February 28th, 1889.

Know all men by these presents that we, Arthur Denis, as dative testamentary executor of successions of L. F. Foucher de Circé and of Mrs. L. F. Foucher de Circé, as principals, and also Mrs. Louise Burthe, widow and tutrix, and individually; Louis Burthe, Delord Burthe, L. Andre Burthe, Mrs. Felicie Brierre, and Maurice E. Brierre, to assist her; Thomas Butler, tutor; Marie Estelle
60 Burthe, Mrs. Widow F. Geo. Burthe, tutrix; Andre Burthe, Marguerite Burthe, Antoinette Burthe, Maude Burthe, and Victor Burthe, also as principals, and Elmore Dufour, as surety, are held and firmly bound unto E. A. Luminais, clerk of the civil district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of one hundred and fifty dollars ($150.00); for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated, in the city of New Orleans, on this twenty-seventh day of February, in the year of our Lord one thousand eight hundred and eighty-nine (February 27th, 1889).

Whereas the above-bounden Arthur Denis, testamentary executor; Louis Burthe, *et als.* have this day filed a motion for a suspensive appeal from final judgment rendered against said Arthur Denis, as such testamentary executor of said successions, ordering him to amend the tableau of distribution therein filed to the prejudice of the other principals herein above named, Nos. 2036 & 2037 of the civil district court for the parish of Orleans, on the fifteenth day of February, 1889, and signed on the 21st day of February, 1889:

Now, the condition of the above obligation is such that the above-bounden Arthur Denis, testamentary executor; Louis Burthe, and the other principals hereinabove fully named shall prosecute their said appeal and shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied by the pro-
61 ceeds of the sale of their estate, real or personal, if they be cast in the appeal; otherwise that the said Elmore Dufour, as surety aforesaid, shall be liable in their place.

(Signed) ARTHUR DENIS, *Test'y Ex.* [SEAL.]
" FELICIE BRIERRE. [SEAL.]
" M. E. BRIERRE. [SEAL.]
" D. BURTHE. [SEAL.]
" LOUIS BURTHE. [SEAL.]
" LOUISE BURTHE, [SEAL.]
Individually and as Tutrix.
" L. ANDRE BURTHE, [SEAL.]
Per HENRY CHIAPELLA, *Agent.*
" HENRY CHIAPPELLA, [SEAL.]
For Thomas Butler, Tutor, and for Louise Butler, Marie Estelle Burthe, Mrs. Widow F. Geo. Burthe, Tutrix; Andre Burthe, Marguerite, Antoinette, Maude, & Victor Burthe.
(Signed) ELMORE DUFOUR. [SEAL.]

Signed, sealed, and delivered in the presence of—

(Signed) HENRY CHIAPPELLA;
" L. SORAPURU.

62 *Agreement.*

Civil District Court, "Division B," Parish of Orleans.

Successions of L. F. Foucher de Circe and Mrs. L. F. Foucher de Circe. } Nos. 2036 & 2037 (Consolidated).

To E. A. Luminais, Esq., clerk civil district court.

Dear Sir: In making transcript of appeal to Supreme Court in above-consolidated cases please include following documents and no more, viz:

1. Petition filing tableau of test'y executor, filed Dec. 23rd, '85.
2. Tableau annexed to same, " " " "
3. Oppositions of P. L. & D. F. Burthe to tableau, January 9th, '86.
4. Two motions to consolidate, December 21st, '85.
5. Note of evidence for executor, Febr'y 13th, '89.
6. " " " " opponents, " " "
7. Admission of counsel (X X Z), " 7th, "
8. Award, filed Feb'y 7th, '89.
9. Letter of A. O. Aldis, " " " "
10. Three letters of Alex. Porter Morse, " " " "
11. Letter of Janin, " " " "
12. Affidavit of P. L. & D. F. Burthe (C), " " " "
13. Extracts letters Janin to Denis, " " " "
14. Opinion, rendered Febr'y 15th, '89.
15. Judgment.

63 16. Motion and bond of appeal, filed Feb'y 27th, '89.

And oblige, yours resp'y,

(Signed) HENRY CHIAPPELLA,
Att'y for Appellants.

By agreement of counsel the following go up in original:

16. Red book called Report French Claims Commission.
17. Memorial A. Denis, test'y exe'tor, before claims commission.
18. Rules of said French claims commission.
19. Brief for claimant before said claims commission.

The whole subject to bills of exception reserved by counsel for appellants.

(Signed) HENRY CHIAPPELLA,
Att'y for Appellants.
(Signed) CHARLES CARROLL,
For Appellees.

Certificate.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, Edgar A. Luminais, clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing sev-
64 enty-two pages, as per agreement of counsel, do contain a true, correct, and complete transcript of all the proceedings had, documents filed, testimony and evidence adduced upon the trial of the cause entitled "Succession of L. F. Foucher de Circe and Succession of Mrs. L. F. Foucher de Circe, Consolidated," instituted in this court and now in the records thereof under the Nos. 2036 & 2037.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this fifteenth day of March, in the year of our Lord one thousand eight hundred and eighty-nine, and in the one hundred and thirteenth year of the Independence of the United States of America.

[SEAL.] (Signed) E. A. LUMINAIS, *Clerk.*

65 UNITED STATES OF AMERICA, *State of Louisiana:*

Proceedings had in the Supreme Court of the State of Louisiana.

Succession of FOUCHER DE CIRCE and of Mrs. L. F. FOUCHER DE CIRCE. } No. 10356.

Transcript of appeal filed March 18th, 1889.

Cause Submitted.

Extract from the Minutes of April 26th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

Succession of L. F. FOUCHER DE CIRCE and of Mrs. L. F. FOUCHER DE CIRCE. } No. 10356.

66 This case was called for trial, and after hearing argument of Henry Chiapella, Esq., of counsel for appellant, and Henry Denis, Esq., for opponent and appellee, the same was taken under advisement by the court.

Reasons for Judgment.

Supreme Court of the State of Louisiana.

CLERK'S OFFICE, *May 20th*, 1889.

Succession of L. F. FOUCHER DE CIRCÉ and of Mrs. L. F. FOUCHER DE CIRCÉ. } No. 10356.

Appeal from the civil district court, parish of Orleans.

Mr. Justice McEnery delivered the opinion and decree of the court in the words and figures following, to wit:

Louis Frederick, Marquis de Circé, a citizen of France, owned property in Louisiana, which was taken possession of by the U. S. Government during the civil war, and the property was used and damaged and some portions destroyed. The Marquis de Circé died in 1869, and by his will instituted his widow his universal legatee. The widow, the Marquise de Circé, died in 1877, and in her will instituted her nieces and nephews her universal legatees under the terms of the treaty between the United States and France of July 15th, 1880, the object and purpose of which was the final award of all claims of the citizens of one nation against the other for all acts of the civil and military authorities during the civil war between the States and the insurrection of the Commune which
67 injuriously affected the citizens of the other. The dative testamentary executor of the succession of the Marquis de Circé presented a memorial to the French-American commission for the damage done to the property of the said Marquis de Circé in Louisiana.

The amount of $9,200, with five per cent. interest from April 1st, 1865, was awarded on account of said claim to Arthur Denis, dative testamentary executor of L. F. Foucher de Circé. The net proceeds of this amount, $5,280, the executor proposes to distribute ratably among the legatees under the will of the widow Foucher. The French Government collected the claim and paid the amount to the executor to be distributed. Two of the legatees under the will are French citizens and the others citizens of the United States. The legatees who are citizens of France claim the whole amount awarded by the commission on the ground that they are French citizens and only to them as such could the award have been made, thus excluding the other legatees from the bequest made by their common testator.

There can be no doubt but that the proper interpretation of the treaty is that awards could only be made to French citizens for damages inflicted by the civil and military authorities of the U. States. The award was made in favor of the representative of a deceased French citizen to his dative testamentary executor and paid to him as such representative, and has been placed in his pos-

session as an asset of said succession, to be disposed of in the course of its administration.

The decision of the commission, within the scope of its authority, is conclusive and binding, and it passed on the validity of the claim of a French citizen and declared it to be valid. The French citizen had died and the award was made to his legal representative.

68 There was no authority delegated to the commission to adjust all conflicting rights of different parties to the fund awarded. It had determined that it had jurisdiction of the claim because presented by the legal representative of the deceased French citizen, and the "validity and amount of the claim being once ascertained by their award the fund might well be permitted to pass into the hands of any claimant, and his own rights, as well as those of all others who asserted a title to the fund, be left to the ordinary course of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights or equities of all the parties."

Comegys *vs.* Vasse, 12 Wheaton, 531.

If the award had been made in favor of opponents only because they were French citizens, without any inquiry into the origin of their right, it ought to have been paid directly to them by the French Government, and the award ought to have been made specifically to them.

The claim was a part of the estate of the Marquis de Circé which passed by his will to his widow and by her will to her legatees. She had a right to dispose of it as freely and fully as she could of any other item of her property which composed the mass of her estate and which she owned at the time of her death to any person or to more than one and in such proportions as she saw fit to designate, as she left neither ascendants nor descendants.

All of her legatees come in for a part of her estate, as designated by her, and who claim participation in the distribution of the fund under the will, as legatees, for their respective portions.

Claiming under the will of Madame de Circé, the court cannot alter the intentions as expressed therein by Madame de Circé and increase the share of some of the legatees to the exclusion of

69 others.

In the absence of an express, final, and determinate decree of the commission as to whom the award was due we cannot review the judgment of the commission and say that the award was in favor of certain legatees when the award was made in favor of the executor and the amount paid to him on account of the succession. Why is the claim here on his account for distribution? If the amount was due exclusively to the French legatees we cannot understand why the French Government did not pay the claim to them directly.

It is in the hands of the executor as part of the estate of Madame De Circé and the fund must be shared under the terms of her will.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed and the opposition dismissed

at opponents' costs, and that the tableaux of distribution be homologated according to the classification therein.

Mr. Justice FENNER dissenting:

Considering—

1st. That the money to be distributed was collected under a treaty between the United States and France;

2nd. That under the terms of the treaty as interpreted by the commission organized under it neither country could recover from the other any award except where the actual claimants, by whatever title, whether by descent, devise, or conveyance, were at the date of the award citizens of the country recovering;

3rd. That, as decided by the Supreme Court of the U. S., the decision of the commission settles nothing but the amount and validity of the claim as between the two nations, and leaves open the question as to what parties are actually entitled to claim the benefit of the award;

70 4th. That evidence properly received shows that the opponents were the only French citizens interested in the claim; that the claim, to the extent of the interest of the American co-legatees, was substantially abandoned by their own counsel, and that the amount awarded was really only that proportion of the total claim which fell to these opponents;

5th. That the executor presented the claim and received this fund, not as executor simply but as attorney in fact of all the legatees, including the opponents, and is bound to pay it to the parties legally entitled and for whose benefit the award was made, who are fully proved to be the opponents herein:

I dissent from the opinion and decree and think the judgment appealed from should be affirmed.

Judgment and Decree.

Extracts from the Minutes of May 20th, 1889.

The court was duly opened, pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Samuel D. McEnery, associate justices.

Absent: His honor Lynn B. Watkins, associate justice.

71–89 Succession of L. F. FOUCHER DE CIRCE and of Mrs. L. F. FOUCHER DE CIRCE. } No. 10356.

Mr. Justice McEnery pronounced the judgment and decree of the court in the words and figures following, to wit:

It is ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed and the opposition dismissed at appellants' costs, and that the tableaux of distribution be homologated according to the classification therein.

* * * * * * *

90 *Reasons for Refusing Rehearing.*

Succession of L. F. FOUCHER DE CIRCE and of Mrs. L. F. FOUCHER DE CIRCE. } No. 10356.

Mr. Justice Watkins pronounced the opinion and decree of the court on application for rehearing in the words and figures following, to wit:

On making an independent examination of this case I feel satisfied that the opinion of the court is correct.

It appears to my mind clear that the plan for the award was made originally in the name and for the account of Marquis Foucher de Circé; that he made a will instituting his wife his universal legatee and died; that his widow succeeded to all the rights of her deceased husband and made a will instituting her nephews and nieces as universal legatees in equal part. She died and her executor was made party to the proceedings before the commission, and subsequently the opponents made themselves parties thereto and joined the executor in virtue of their rights as legatees.

The commission made an award in general terms, not designating the names of the beneficiaries. The award was paid to the French Government and it transmitted same to Arthur Denis, executor. Thus her purposes to distribute among all the legatees ratably under the terms of the will. Opponents set up claim to the whole in virtue of their being French citizens as well as legatees. They do not claim as simple heirs and sue for a fund in the hands of a
91 stranger, but appear in the succession of Mrs. L. F. Foucher de Circé and claim as legatees the whole sum and excess of the share allotted them.

We must of necessity treat this fund as the property of Mrs. Foucher's succession and not that of opponents. They, being collaterals, had no rights except under the will of Mrs. Foucher. The whole record furnishes ample proof of this, and I concur in the majority opinion of the court.

Rehearing Refused.

Extracts from the Minutes of May 31st, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

Mr. Justice Watkins pronounced the opinion and decree of the court on application for rehearing in the following case:

Succession of L. F. FOUCHER DE CIRCE and of Mrs. L. F. FOUCHER DE CIRCE. } No. 10356.

Rehearing refused.

92 *Rules of the French and American Claims Commission with the Convention Establishing the Commission. Document Filed March 18th*, 1889.

Second edition.

Washington, D. C.:
Gibson Brothers, Printers.
1880.

93 DOCUMENT "B." Filed March 18th, 1889, in Supreme Court of La., in original, with transcript.

Rules of the Commission for the Settlement of Claims under the Convention between the United States of America and the French Republic, of January 15, 1880.

I.

In addition to the representation of his claim and the proofs in support thereof which shall have been presented to his government, the claimant shall file in the office of the commission a statement of his claim in the form of a memorial addressed to the commission.

No allowance will be made to any person for any share of or interest in a claim unless he appear as claimant and set forth his interest.

If a claimant be dead his executor or administrator, or the legal representatives of the estate, must appear unless it be shown that there are no creditors and that the estate is settled.

If there be a widow of the deceased claimant she must appear as claimant or her share will not be allowed.

If there be heirs they must appear unless they are minors under 21 years of age. Minors must appear by guardian or tutrix.

All persons may be joined as claimants in whom the right to any legal or beneficial relief is alleged to exist, whether jointly,
94 severally, or in the alternative. Any award may be given to such one or more of the claimants as he or they may be entitled to.

II.

Every memorial shall state the full name, residence, and post-office address of the claimant, the place and time of his birth, and, if a French citizen, the place and places of his residence between the 13th April, 1861, and the 20th August, 1886, and, if an American citizen, the place or places of his residence during the war between France and Mexico, the late war between France and Germany, and the " insurrection of the commune."

III.

The memorial must state whether the claimant is a French or an American citizen; whether native or naturalized; and if he claim in his own right, when the claim had its origin, and of what country

he was then a citizen; if in the right of another, whether such other was a French or American citizen when the claim had its origin, and where was then and is now his domicile. If he be a naturalized citizen of the Government by which his claim is presented, an authenticated copy of the record of his naturalization must be appended to the memorial. But in case of loss or destruction of letters of naturalization, the memorial must state the fact and the circumstances attending the same as far as known to claimant. And the memorial shall also state whether he has been naturalized in any other country; and if not so naturalized, whether he has taken any, and what, steps toward being so naturalized.

IV.

95 If the claim be preferred in behalf of a firm or association of persons other than a corporation or joint-stock company, the name of each person interested, both at the date the claim accrued and at the date of verifying the memorial, must be stated with the proportion of each person's interest. And all the particulars above required to be given in the case of individual claimants must be stated in respect of each member of such firm or association, unless the same be dispensed with on special order of the commission. If any transfer of claim, or any part thereof, has occurred, the nature and mode of such transfer must be stated, the person to whom made, how, when, by what means, and for what consideration.

V.

The nationality of the firm must also be stated.

VI.

The memorial must state whether the claimant or any other person entitled to the amount claimed, or any part thereof, has ever received any, and, if any, what, sum of money for the claim or any part thereof; and, if so, when and from whom the same was received.

Whether the claim, or any part of it, has ever been presented to any tribunal, department, or authorities of either the United States or France; and, if so, when, where, and what proceedings were had in regard to the same, as far as such facts may be known to the claimant.

And whether the claim, or any part of it, has been already disposed of, diplomatically, judicially, or otherwise, by competent authorities of either Government.

VII.

96 The memorial must state the particulars of the claim, its amount, the time when and the place where and the acts from which it arose; the names and rank and regiment or office of the person committing the acts from which it arose; the kind or kinds and amount of property lost or injured, and all the facts and

circumstances attending the loss or injury out of which the claim arises, so far as known to or ascertained by the claimant.

The items of the claim must be numbered in order, and in every claim the cause of action and amount of damages shall be fully and specifically set forth, and the articles of personal property taken, and the kinds, quantities, and values; and in case of personal injuries, the time and place and the name and rank or office of the person committing the act, if known, must be stated.

If any voucher, receipt, or other writing was given for the property the names of the parties to it and its substance must be given. If the claimant have the original or a copy of it he may append a copy to the memorial; if it is lost or destroyed he must state how lost or destroyed or account for its absence.

If the acts were committed upon the high seas the memorial must state them, the name of the vessel from which the acts proceeded, the name of the commanding officer, and when, where, and by whom committed if known to claimant, and whether claimant was present, and all the circumstances attending the transaction.

VIII.

If the claim be against the United States the memorial must state that the claimants were not in service of the enemies of the United States and did not voluntarily give aid or comfort to the same between the 13th April, 1861, and the 20th of August, 1866.

97 If the claim be against the French Republic the memorial must state that the claimants were not in the service of the enemies of France and did not voluntarily give aid or comfort to the same during the late war between France and Germany or during the insurrection of the commune.

IX.

The claimant must state distinctly in his memorial the amount for which he asks judgment, giving the amount of principal and interest separately.

X.

The memorial shall be verified by the oath or affirmation of the claimant, or, in the case hereinafter provided, of his agent or attorney; or if the claim be by a firm or an unincorporated association of persons, then by the oath or affirmation of one of them; or in the case of a corporation or joint stock-company, by the oath or affirmation of the president or other officer. Such oaths or affirmations may be taken, if in the United States or France, before an officer having authority, according to the laws of the place, to administer oaths or affirmations; and they may be taken in the said countries, or elsewhere, before any consul or diplomatic agent of either government. The verification may be by the agent or attorney specially authorized for that purpose only when verification by the claimant is substantially impracticable or can only be given at great inconvenience; and in case of verification by agent or at-

torney the cause of the failure of the claimant to verify shall be stated.

XI.

98–107 Objections that the claim has not been duly made, preferred, and laid before the commissioners, either wholly or to any extent, pursuant to the eighth article of the convention, must be filed with the secretaries within thirty days after the filing of the memorial.

Objection to the jurisdiction of the commission or to the sufficiency of the case stated in the memorial may be made in the form of a demurrer, stating without technical nicety the substantial ground of the objection. Any new matter constituting a special ground of defense may be stated in a plea which may be the subject of demurrer. Demurrers and pleas may be set for hearing by the party demurring or pleading, as the case may be, on twenty days' notice.

XII.

It shall not be necessary for either government to deny specially in writing the validity of any claim; but a general denial of every claim shall be entered of record by the secretaries as of course, and thereby all the material allegations of the memorial shall be considered as put in issue and the claimant required to prove them by legal and sufficient evidence.

XIII.

The memorial may be amended upon notice given by the agent of one government to the other at any time during the period of six months granted to claimants to file their memorials, but in any other case, except as is hereinafter provided, no leave to amend memorials shall be granted. Whenever the demurrer interposed by the government defendant is sustained leave may be granted by the commission to amend the memorial in the cause provided no new parties shall be introduced or the cause of action changed.

* * * * * * *

108 "A." Filed 18th March, 1889, in Supreme Court of Louisiana, in original, with transcript.

French and American Claims Commission.

No. 603.

Filed June 21, 1881. W. F. P. & L. L., Secs.

ARTHUR DENIS, Dative Testamentary Ex'r of L. F. Foucher, Marquis de Circe,
against
THE UNITED STATES.

(1.)

Memorial.

To the French and American Claims Commission, organized under the convention of January 15th, 1880, between the United States of America and the French Republic:

Arthur Denis, dative testamentary executor of the succession and estate of the late Louis Frederick Foucher, Marquis de Circé, deceased, duly appointed by decree of the civil district court for the parish of Orleans, in the State of Louisiana, rendered and signed on the 5th day of March, eighteen hundred and eighty-one, the residence, domicile, and post-office address of said Arthur Denis being at New Orleans, La., claimant, against The United States of America.

I.

Claimant shows that he presents this claim in the right of Louis Frederick Foucher, Marquis de Circé, deceased, and joins with him as claimants the persons hereinafter named, in whom
109 now exists the right to the said claim and to the award herein prayed for against the United States of America.

He shows that the said Foucher died in France on the 22nd of November, 1869, leaving property in the State of Louisiana; that his succession was open and administered upon in that State and was closed and the heirs put in possession and the executor discharged, but that for the purposes of the prosecution of this claim and for the final settlement of his estate the succession has been reopened, and the said Arthur Denis has been appointed dative testamentary executor of said estate by decree of the civil district court for the parish of Orleans, State of Louisiana, rendered and signed on the 5th day of March, 1881, in the matter of said succession, No. 2036 of the docket of said court.

That from the 13th day of April, 1861, and long before, and from that date to the date of his death, in the year 1869, the said Louis Frederick Foucher, Marquis de Circé, was a French citizen, and that he was never naturalized a citizen of the United States; that

he never gave aid or comfort to the enemies of the United States, and particularly that he never took any part in the war of the rebellion against the United States.

That the said Louis Frederick Foucher was born in the year 1798, in the city of New Orleans, then a part of the dominions of the King of Spain, and his father, Pierre Foucher, was born in 1755, also in the city of New Orleans, at that time a part of the dominions of the King of France, and the latter's father, Antoine Foucher, who was Marquis de Circé, was born in France.

110 That the said Louis Frederic Foucher, the testator of claimant, was an inhabitant of Louisiana when it was retroceded by Spain to France, 1800, and also at the time it was ceded by France to the United States, in 1803, and that he lived in the city of New Orleans, in the State of Louisiana, until the year 1836, when he removed with his wife to France with the intention of recovering or resuming his French nationality as the son of a French citizen, and that he did so recover and resume the quality of a French citizen, if it can be supposed that he had ever lost it in the eye of the French law; that he continued to live in France to the day of his death, in 1869, never returning to the United States, not even on a visit.

That he resumed there and wore, without contest, the title of Marquis de Circé, which belonged of old to his family, and which title was indeed judicially recognized in him by the courts of France as far back as April 12th, 1851. He bought a chateau, had a family tomb built, removed the greater portion of his property to France, exercised there during many years the rights of an elector, and died in Paris in 1869, and was there buried, according to his instructions and wishes, in his family tomb.

And claimant avers that under articles 10 and 18 of the Code Napoleon the said Louis Frederic Foucher was a French citizen at the date of the breaking out of the war of the rebellion in the United States of America, and that in the eye of the law of the United States he had by his expatriation and departure from the

111 United States in 1836, by his intention of permanently establishing himself in France, and by the carrying *out* of said intention into effect renounced his American citizenship, involuntarily acquired, if at all, by the admission of Louisiana into the Federal Union, and had become, if he was not so already, a citizen of France.

And claimant further shows that the status of the said L. F. Foucher, Marquis de Circé, as a French citizen, was judicially established by a judgment of the supreme court of the State of Louisiana, rendered on the 5th of May, 1879, in a suit of the State of Louisiana against the widow and universal legatee of said Louis Frederic Foucher (No. 7469 of the docket of said court); that the main question in said suit was as to the status of said L. F. Foucher. The suit was brought to recover from the said widow Foucher, as his universal legatee, a tax of ten per cent. imposed by the law of Louisiana on successions inherited by citizens of Louisiana not residing and domiciled in that State, and the court decided that the tax was not due, because Louis Frederic Foucher was not a citizen of Louisiana but of France, and that the status of his wife followed his own.

II.

The claimant shows that on and long before the 13th of April, 1861, to wit, since the year 1834, and from then on to the time of his death, in 1869, the said Louis Frederic Foucher, Marquis de Circé, was the owner of a large tract of land then forming part of the parish of Jefferson, in the State of Louisiana, and situated be-
112 tween Burtheville and Greenville, on the same side of the Mississippi river as the city of New Orleans and within its immediate environs, said tract then known as the Foucher plantation, and having a frontage on the Mississippi river of about twelve and one-half arpents by a depth of about seventy arpents, more or less, the arpent being about $(\frac{85}{100})$ eighty-five one hundreths of an acre, said tract being now comprised within the corporate limits of the city of New Orleans.

That on said 13th day of April, 1861, and since the 16th day of September, 1860, the said tract, established and equipped as a large brick yard, was under lease by said Foucher to one P. Choppin at a yearly rental of three thousand dollars, the said lease having been made in 1861 for three years and the said rent being payable only in the metal coin of the United States.

And there was situated on said tract a brick dwelling-house, kitchens, stables, carriage-house, dwellings for laborers, oxen, horse and cart houses, steam saw-mill, with machinery and appurtenances, all complete; brick yard, brick machine, brick-kilns, drying brick racks and sheds, blacksmith, carpenter, and wheelwright shops, about seventy thousand five hundred and fifty feet of railroad, many thousand feet of rail fence and picket fence, and other erections and improvements and building materials, the whole more accurately and fully described in Exhibit No. 1, hereto annexed, to be read in connection with Exhibit No. 2, which is a true copy of a plan of said tract, with the buildings and improvements that were or had been on it; said plan made in 1864 by J. A. D'Heme-
113 court, land surveyor, assisted by Peter Ross, architect and builder.

That the city of New Orleans and its environs, including the adjacent towns or settlements of Burtheville and Greenville, between which the said Foucher tract lay, at a distance of not more than six miles from the oldest portion of the city of New Orleans (which city stretches along the Mississippi river with great length, but very little depth, being stopped by a swamp in the rear), were captured early in May, 1862, by the armed forces of the United States; and on May 6th, 1862, Major General Butler, the general in command of the troops of the United States, who had previously taken possession of the city, issued a proclamation, dated May 1st, 1863, wherein he declared that "the city of New Orleans and its environs, with all its interior and exterior defences (the aforesaid tract of land of L. F. Foucher being situated within said defences), having been surrendered to the combined naval and land forces of the United States, and having been evacuated by the rebel forces, in whose possession they lately were, and being now in occupation of the forces of the United States, who have come to restore order, maintain public tran-

quility, enforce peace and quiet under the laws and Constitution of the United States, the major general hereby makes known and proclaims the object and purposes of the Government of the United States in thus taking possession of the city of New Orleans and the State of Louisiana, &c. All rights of property of whatever kind will be held inviolate, subject only to the laws of the United States," and that "all foreigners not naturalized claiming al-
114 legiance to their respecting governments and not having made oath of allegiance to the government of the Confederate States would be protected in their persons and property, as heretofore, under the laws of the United States."

And claimant avers that the said Foucher came entirely within the promise of protection to foreigners contained in said proclamation, because he never did take an oath of allegiance to the so-called Confederate States.

That thereafter and until the 20th August, 1866, the city of New Orleans and its environs, including the locality in which lay said tract of land, was in the undisturbed, substantial, complete, and permanent military occupation and control of the United States, and that therefore the said city and said locality ceased, from the date of said proclamation, to be in a condition of rebellion, and the said property of said Foucher was as much entitled to immunity from destruction, damage, and appropriation by the armed forces of the United States as if it had been situated in any of the loyal States of the Union not in rebellion against the Federal Government.

That on or about October 17th, 1862, the said lessee, P. Choppin, was notified by the U. S. military authorities to leave and depart from the said tract of land, and he accordingly did vacate the same on or about October 19th, 1862, and never resumed his lease or paid any further rent; and claimant avers that the yearly rent of $3,000 gold or its equivalent, which the said Choppin was paying, was no more than a fair rent for the said tract so leased to
115 him; that the said tract had therefore been leased for the same business of manufacturing and selling bricks, and had been thus used and worked as a brick yard under a notarial lease made on 4th September, 1850, by said L. F. Foucher to one Alexder Bonneval for the term of ten years, from 1850 to 1860, at the same yearly rental of three thousand dollars.

That on or about the 19th of October, 1862, the military authorities of the United States took possession of the said tract; that the buildings of all description, the fences and railroad—in short, the erections of all kinds—situated on said tract were torn down and demolished or greatly damaged by the troops and workmen of the United States, acting under regular military orders, particularly of the following-named officers of the quartermaster branch of the army, department of the Gulf, and who formed part of the forces stationed at New Orleans, viz., S. B. Holabird, now colonel, then chief quartermaster, department of the Gulf; J. G. Chandler, now lieut. col.; E. G. Beckwith, now major on the retired list; H. L. Jones, now resigned, and then quartermaster of volunteers, and —— Constable, now dead; that the materials of the demolished build-

ings and other materials on said tract or so much thereof as could be made available were carted away or used in the construction of the "Sedgwick hospital and barracks" buildings, which were erected by the United States upon said tract and were occupied by the U. S. troops from about the year 1864 to 31 December, 1870.

That the items, the extent and character of the injuries committed upon said tract, and the buildings and improvements
116 thereon are particularly and accurately described in the Exhibit No. 1 (hereto annexed in connection with the plan constituting Exhibit No. 2), said Exhibit "No. One" being the report made to Eug. Rochereau & Co., agents at New Orleans of the said Louis Frederick Foucher, by experts and appraisers employed by them for the purpose of visiting the property and reporting on its condition and on the nature and extent of the damages and injury committed as aforesaid; and claimant, believing the statements of the two exhibits to be truthful and accurate, adopts the same and makes them his own, including the estimates in money of the amount of damages, which estimates were made from the basis of the legal-tender paper money of the United States, and showed damages in the aggregate to the extent of ($88,449) eighty-eight thousand four hundred and forty-nine dollars.

And claimant avers that further damages and injuries were committed subsequent to the date of the report hereto annexed as Exhibit No. 1; that other buildings and improvements on said Foucher plantation were destroyed and bricks and other materials appropriated and used by the Federal troops quartered on said plantation; and claimant hereto annexes as Exhibit No. 3 a supplemental report of said additional damage and injury made by the said Peter Ross, the expert and appraiser hereinbefore named, said supplemental report to be also read in connection with the plan hereto annexed as Exhibit No. 2; and claimant, also believing the statements and
117 estimates in said supplemental report to be truthful and accurate, adopts the same and makes them his own, the estimates in said supplemental report showing damages in the aggregate to the extent of ($13,550) thirteen thousand five hundred and fifty dollars in the legal-tender paper money of the United States.

Claimant cannot undertake to specify and state the exact and particular use made by the United States of the materials appropriated as aforesaid from the buildings and improvements damaged or destroyed on said plantation. In the nature of things no one could be expected to show or state in detail the use made of said materials. Claimant can only aver that the demolition and appropriation were mainly for the purpose of using the materials in the construction of the "Sedgwick hospital and barracks," and that to the best of his information and belief they were so used.

And claimant avers that the amount in money of the total of all such damages as aforesaid done and committed upon said tract was, in the legal-tender paper money of the United States as established by the said two reports of experts and appraisers, the sum of ($101,999) one hundred and one thousand nine hundred and ninety-nine dollars, exclusive of the loss occasioned to said Foucher by the dispos-

session of the said tenant and the occupation of said tract by the United States.

That, as heretofore alleged, the United States military authorities and troops, after having dispossessed the said lessee
118 and tenant, P. Choppin, took possession of the said Foucher plantation on or about the 19th of October, 1862, and continued to use and occupy the same (even after the erection of the Sedgwick hospital and barracks), without paying rent or compensation for the occupation of said plantation, until the first of June, 1866, when, under the terms of a written lease made by the United States authorities and, as claimant believes, by Andrew J. McGonnigle, quartermaster, with the said Rochereau & Co., agents of said Foucher, for the term from the 1st of June, 1866, to 31st of December, 1866, the said United States authorities paid rent for the said property during said term at the rate of four hundred and fifty dollars per month; that under new leases the said United States authorities continued to occupy said plantation and pay rent for the same until about the 31st of December, 1870, when the said United States authorities vacated the said plantation and ceased to pay rent for same, according to official notification given to W. T. Hepp, a partner in the firm of Rochereau & Co., agents of said Foucher, by Captain E. J. Strang, A. Q. M., as follows:

Office depot quartermaster, corner Camp and South streets,

NEW ORLEANS, LA, *December 14th*, 1870.

Mr. W. T. Hepp, agent for L. F. Foucher, Esq., New Orleans, La.

SIR: You are respectfully notified that the premises rented from you and occupied by the Sedgwick barracks buildings
119 will be vacated upon and rent cease from the 31st day of December, 1870, the United States quartermaster's department no longer requiring the use of the same.

Very respectfully, your ob't servant,

E. J. STRANG,
Capt. and A. Q. M., B'vt L't Col., U. S. A.

Claimant avers that for the dispossession of said tenant Choppin and for the use and occupation of the said plantation without rent or compensation from about the 19th of October, 1862, to 1st of June, 1866—say for three years and seven months—at the said yearly rental of three thousand dollars, the said L. F. Foucher is entitled to indemnity from the United States Government of ($10,750), ten thousand seven hundred and fifty dollars, which is also here claimed; that no compensation has ever been received from the United States or from any other authority for the wrongs and injuries or any part thereof suffered as aforesaid by the said Foucher; and claimant avers that the claim founded on the above-stated facts or any of them has never been in any way settled or disposed of diplomatically, judicially, or otherwise by competent authority of either the Goverment of the United States or that of France, and that such claim has never, as claimant is informed and believes,

been presented anywhere, unless, perhaps, to the military claims commission commonly called the Canby's claims commission.

That claimant does not know that the claim was ever presented to said commission, and he believes that it was not, and he
120 avers that if it ever was so presented it was not prosecuted before said commission, and no decision was ever made upon it there; that the papers of the said commission are in the United States War Department; that claimant has, through an attorney-in-fact, endeavored to obtain permission to inspect the papers that might relate to this claim, but that such permission was refused him, and the instruction was given by the officials of that Department that the desired information could only be obtained by means of a formal application through this honorable commission for such papers; that claimant has made such application, and that when said papers, if any there be, shall be placed in the possession of this commission the agent and counsel of the United States will have the first opportunity to examine them and ascertain whether they contain any matters which can serve the purposes of the defence; that the claimant cannot prudently wait, nor is there any useful reason why he should wait, for the production of such papers (which very likely do not exist) before preparing his memorial.

III.

Claimant avers that the place of residence of said Louis Frederick Foucher, Marquis de Circé, from the 13th of April, 1861, to the 20th of August, 1866, was Paris, in France, and that during all said period his domicile was at the same place; that the said Foucher was never naturalized in any country nor took any steps to be naturalized in any country, except and unless in so far as the transfer of Louisiana from France to the United States and the admis-
121 sion of Louisiana into the Union or the facts hereinbefore stated in connection with the resumption or acquisition of French nationality by the said L. F. Foucher may, in the opinion of this honorable commission, constitute what is meant by the last phrase of the 3rd rule of the commission.

That no sum of money whatever has ever been received by the claimant or any other person for this claim or any part thereof.

That claimant knows no more than what has already been hereinbefore stated as to or about the presentation of this claim to any tribunal, department, or authority of either the United States or France.

That this claim has not been, nor has any part of it been, already disposed of diplomatically, judicially, or otherwise by competent authorities of either Government.

That the claimant has already hereinbefore stated all the particulars mentioned in the first paragraph of art. VII of the rules so far as the same are known to or ascertained by him.

That no voucher, receipt, or other writing was given for any of the property herein mentioned as injured or appropriated.

That the said Foucher was not in the service of the enemies of the United States and did not voluntarily give aid or comfort to

the same between the 13th of April, 1861, and the 20th of August, 1866.

That the amount of principal for which the claimant asks judgment is ($112,749) one hundred and twelve thousand seven hundred and forty-nine dollars and interest.

122 That claimant cannot state the amount of interest for which he asks judgment, because he claims interest from August 20th, 1866, up to the close of the commission at the rate of six per centum per annum, but that the amount of such interest up to the date of claimant's oath to this memorial is the sum of ($99,970.77) ninety-nine thousand nine hundred and seventy $\frac{77}{100}$ dollars.

IV.

Claimant further shows and avers that the said Louis Frederick Foucher, Marquis de Circé, as heretofore alleged, died in Paris, France, in 1869; that he left no issue, and by his last will and testament appointed and constituted his wife, Marie Marguerite Felicie Burthe, his universal legatee, bequeathing unto her the whole of his property, real and personal, except the one undivided half of the tract of land hereinbefore described, which was devised as a special legacy to Mrs. Aline Delachaise, wife of François Dugué.

Claimant further shows that the succession and estate of the said Louis Frederick Foucher, Marquis de Circé, was duly opened in the city of New Orleans, State of Louisiana, and that by a judgment of the second district court for the parish of Orleans, State of Louisiana, signed on the 17th day of May, 1870 (said court being then the probate court for the parish of Orleans and city of New Orleans), it was ordered, adjudged, and decreed that Mrs. Aline Delachaise, wife of François Dugué, be put in possession of the said half of

123 said plantation, and that Mrs. Marguerite Felicie Burthe, widow of Louis Frederic Foucher, Marquis de Circé, be recognized as his heiress and universal legatee, and as such be put in possession of all the property of which he died possessed.

And claimant therefore alleges that the said Mrs. Widow Louis Frederic Foucher de Circé thus became the sole owner of the claim for damages against the Government of the United States of America which is now asserted and prosecuted before this honorable commission.

Claimant further alleges that the said claim for damages was never asserted or prosecuted by the said Mrs. Widow Foucher de Circé before any court, tribunal, committee, or commission, and was never disposed of, settled, or adjudicated upon, judicially, diplomatically, or otherwise, by any competent authority of either the Government of the United States or of the government of France.

Claimant further shows and alleges that the said Mrs. Widow Louis Frederic de Circé died in Paris, France, in November, 1877, without issue, and by her last will and testament appointed and constituted the persons hereinafter named as her universal legatees, and bequeathed unto them the whole of her property, which included the aforesaid claim for damages against the Government of

the United States now asserted and prosecuted before this honorable commission.

Claimant further shows that the succession and estate of the said Mrs. Widow Louis Frederic Foucher de Circé was duly opened in the city of New Orleans, State of Louisiana, and that by a judgment of the second district court for the parish of Orleans, State of Louisiana, signed on the 24th day of October, 1879 (said court
124 being then the probate court for the parish of Orleans and city of New Orleans), it was ordered, adjudged, and decreed that the following-named persons be recognized as the universal legatees of the late Mistress Marie Marguerite Felicie Foucher, widow of the late L. Frederic Foucher, Marquis de Circé, and as such entitled to and that they be put in possession of her entire succession in the following proportions, to wit:

1st. Edmond Burthe, for one-fourth or $\frac{4}{16}$.
2nd. Paul Louis Burthe, for one-eighth or $\frac{2}{16}$.
3d. Dominique François Burthe, for one-eighth or $\frac{2}{16}$.
4th. Louis Burthe, for one-sixteenth, $\frac{1}{16}$.
5th. Delord Burthe, for one-sixteenth, $\frac{1}{16}$.
6th. Mrs. Louise Burthe, wife of Edmond Burthe, for one-sixteenth, $\frac{1}{16}$.
7th. Miss Felicie Burthe, for one-sixteenth, $\frac{1}{16}$.
8th. Laurent Andre Burthe, for one-sixteenth, $\frac{1}{16}$.
9th. Mrs. Marguerite Burthe, widow of Robert O. Butler, for one-sixteenth, $\frac{1}{16}$.
10th. Estelle Burthe and Andre Burthe, minor children of Emmanuel Burthe, each for one thirty-second or jointly for one-sixteenth, $\frac{1}{16}$.
11th. Marguerite Burthe, Antoinette Burthe, Maud Burthe, Victor Burthe, Adele Burthe, and Cary Burthe, minor children of the late F. George Burthe, each for ($\frac{1}{96}$) one ninety-sixth or jointly for one-sixteenth, $\frac{1}{16}$.

And by the same judgment it was further ordered, ad-
125 judged, and decreed that Arthur Denis (the same person as the claimant herein) be discharged from all trust and liability as dative testamentary executor of the aforesaid Mrs. Marie Marguerite Felicie Foucher, and that his bond, given for his faithful administration, be cancelled and annulled and his sureties thereon released.

Claimant further alleges that under advice of counsel, to the effect that the personal representative of the said Mrs. Widow Louis Frederic Foucher de Circé should be made a party to the memorial and to the claim for damages against the United States Government now herein asserted and prosecuted before this honorable commission, it became necessary for claimant to cause the succession of the said Mrs. Widow Foucher de Circé to be reopened and to be further administered upon.

That claimant accordingly made application on the 18th day of January, 1881, to the civil district court for the parish of Orleans, in the city of New Orleans, State of Louisiana (which court then was and is now the probate court for said parish of Orleans, city of New Orleans, in the State of Louisiana), and prayed for letters of dative

testamentary executorship on the estate and succession of the said Mrs. Widow Louis Frederic Foucher de Circé.

That said application, petition, and demand for the administration of the said succession by claimant were ratified and endorsed by the legatees and heirs of the said Mrs. Widow Foucher de Circé, who concurred in the prayer of claimant to said civil district court; that in accordance with said petition, demand, and prayer a
126 decree was rendered by the said civil district court for the parish of Orleans on March 5th, 1881, reappointing the claimant herein, Arthur Denis, dative testamentary executor of the succession and estate of the said Mrs. Widow L. F. Foucher de Circé, and the said Arthur Denis, in his said capacity of dative testamentary executor of Mrs. Widow Foucher de Circé, joins himself to this memorial as a claimant.

Claimant further shows and avers that the said universal legatees of the said Mrs. Widow Louis Frederic Foucher de Circé, judicially recognized as such and put in possession of all the property of which she died possessed, have thereby become the sole owners of the claim for damages against the Government of the United States of America which is now asserted and prosecuted before this honorable commission.

Claimant further alleges that the said claim for damages was never asserted or prosecuted by the said universal legatees of Mrs. Widow Foucher de Circé or by any of them before any court, tribunal, committee, or commission, and that the said claim was never disposed of, settled, or adjudicated upon, judicially, diplomatically, or otherwise, by any competent authorities of the United States Government or of the government of France.

Claimant further avers that the persons hereinafter named universal legatees as aforesaid of the said Mrs. Widow Foucher de Circé, having now in them alone vested the legal or beneficial rights, title, and interest in the claim for damages against the Gov-
127 ernment of the United States which is now asserted and prosecuted before this honorable commission, they are joined in this memorial as claimants, those who are unemancipated minors being represented herein by their tutors or tutrixes, viz:

1st. The five minor children and heirs, all born in Louisiana, of Edmond Burthe, born in New Orleans, in the year 1847, and now deceased, who was heir and legatee of Mrs. Widow Foucher de Circé, for $\frac{4}{16}$ths, viz., Madeleine Burthe, Elodie Burthe, Gabrielle Burthe, Edmond Berthe, and Cecile Burthe, herein represented by Mrs. Louise Burthe, widow of Edmond Burthe, their mother and natural tutrix, judicially confirmed as such tutrix by the civil district court for the parish of Orleans, State of Louisiana, said court having probate jurisdiction for the said parish of Orleans—residence, domicile, and post-office address of said tutrix and minors being New Orleans, La.

2nd. Paul Louis Burthe, born in New Orleans, La., on or about the 9th of November, 1848, heir and legatee of the Widow Foucher for two-sixteenths, is a French citizen and an elector in France, duly registered on the electoral list of the "first arrondissement" of Paris,

France. Residence, domicile, and post-office address, No. 14 rue Duphot, Paris, France.

3d. Dominique François Burthe, a brother of Paul Louis Burthe, born in France in 1852, heir and legatee of the Widow Foucher for two-sixteenths, is also a French citizen and an officer in the French army, to wit, lieutenant in the 24th Regiment of Dragoons. Residence, domicile, and post-office address, No. 14 rue Duphot, Paris, France.

128 4th. Louis Burthe, born in New Orleans, Louisiana, in 1843, heir and legatee of the Widow Foucher for one-sixteenth. Residence, domicile, and post-office address, New Orleans, La.

5th. Delord Burthe, born in New Orleans in 1858, heir and legatee of the Widow Foucher for one-sixteenth. Residence, domicile, and post-office address, New Orleans, La.

6th. Mrs. Louise Burthe, widow of Edmond Burthe, in her own right, heir and legatee of said Widow Foucher for one-sixteenth, born in New Orleans in 1849. Residence, domicile, and post-office address, New Orleans, La.

7th. Miss Felicie Burthe, born in New Orleans in 1862, emancipated by judgment or order of the civil district court for the parish of Orleans, La. (said court having probate jurisdiction in said parish), signed November 1st, 1880, heir and legatee of the Widow Foucher for one-sixteenth. Residence, domicile, and post-office address, New Orleans, La.

8th. Laurent Andre Burthe, born in New Orleans, La., in 1844, heir and legatee of the Widow Foucher for one-sixteenth. Residence, domicile, and post-office address at New Orleans, La.

9th. The four minor children and heirs of Mrs. Marguerite Butler, *nee* Burthe, born in New Orleans in 1842, now deceased, wife of Robert O. Butler, also deceased. Said Marguerite Butler was legatee of said Widow Foucher for one-sixteenth. The said minors are Louise Butler, Robert Butler, Edward Butler, and Marguerite Butler. They were all born in Louisiana and are represented herein by Thomas Butler, their tutor, duly appointed on July 29th, 1880, by the second district court for the parish of Orleans, State of Louisiana, said court being then the probate court for the parish of Orleans and city of New Orleans. Residence, domicile, and post-office

129 address of said tutor and minors, St. Francisville, parish of West Feliciana, La.

10th. The two minor children and heirs, born in New Orleans, State of Louisiana, of Emmanuel Burthe, deceased, legatees of Mrs. Widow Foucher de Circé for one-sixteenth. The said minors are Estelle Burthe and Andre Burthe, and are represented by Mrs. Josephine Pages, widow of Emmanuel Burthe, their mother and natural tutrix, judicially confirmed as such by the late second district court for the parish of Orleans, State of Louisiana, said court being then the probate court for the parish of Orleans and city of New Orleans. Residence, domicile, and post-office address of said tutrix and minors, Liberty, Bedford county, State of Virginia.

11th. Marguerite Burthe, Antoinette Burthe, Maude Burthe, Victor Burthe, Adele Burthe, and Cary Burthe, minor children of the late

F. George Burthe and heirs and universal legatees of the said Mrs. Widow Foucher de Circé each for one ninety-sixth or jointly for one-sixteenth. Said minors were all born in Louisiana, and are herein represented by Mrs. Mary Isabella Nicholas, widow of F. George Burthe, their mother and natural tutrix, judicially confirmed as such tutrix by the late second district court for the parish of Orleans, State of Louisiana, said court being then the probate court for the parish of Orleans and city of New Orleans—residence, domicile, and post-office address of said tutrix and minors being at New Orleans, La.

130 Claimant further alleges that all the above-named parties who are joined herewith as claimants are the same parties who, as heretofore alleged, have been appointed and constituted universal legatees of the said Widow Louis Frederic Foucher, Marquise de Circé, and who have been so recognized, and as such have been in possession of all her property, with the exception of two of said parties, viz., the late Dominique François Edmond Burthe, universal legatee for $\frac{1}{4}$ or $\frac{4}{16}$, and the late Mrs. Marguerite Butler, *nee* Burthe, widow of the late Robert O. Butler, universal legatee for $\frac{1}{16}$, who have both died since the date of the judgment recognizing them as universal legatees, and as such putting them in possession of the succession and estate of the said Mrs. Widow Foucher de Circé, and that, as heretofore alleged, the said two decedents have left issue, represented by their aforenamed tutrix and tutor, who have been joined as claimants herein through their said tutrix and tutor.

Claimant further alleges that none of the parties herein joined as claimants had any interest, right, or title in and to the claim for damages against the Government of the United States of America, herein asserted and prosecuted before your honorable commission, except after and in consequence of the death of the said Louise Frederic Foucher, Marquis de Circé, and of his widow and universal legatee, Mrs. Marie Marguerite Felicie Foucher, Marquise de Circé, and that all of the said universal legatees of the said Mrs. Widow Foucher de Circé were her blood relatives—her nephews and grand-nephews.

131 That the said Widow Foucher resided all the time between the 13th of April, 1861, and the 20th of August, 1866, at Paris, in France, and in its environs, and that she never voluntarily gave aid or comfort to the enemies of the United States.

That none of the universal legatees of the said Widow Foucher and none of the parties herein joined as claimants were in the service of the enemies of the United States, and never voluntarily gave aid or comfort to the same between the 13th of April, 1861, and 20th August, 1866, except Louis Burthe, who was engaged and took part in the war of the rebellion against the United States and was in the service of the so-called Confederate States; that several of the said persons herein joined as claimants were minors between the said dates of April 13th, 1861, and August 20th, 1866, or were residing and domiciled abroad, and several were not even born at that time.

That all the time between the said dates of April 13th, 1861, and August 20th, 1866—

1st. Edmond Burthe was residing in the city of New Orleans and attending school.

2nd and 3d. Paul Louis Burthe and Dominique François Burthe were both residing and domiciled in France.

4th. Louis Burthe was, as above, in the Confederate service.

5th, 6th, and 7th. Louise Burthe, Delord Burthe, and Felicie Burthe were minors, residing with their mother in the city of New Orleans; the latter, Felicie Burthe, only born in 1862.

8th. Laurent Andre Burthe — part of the time between those dates in New Orleans and afterwards in France.

132 9th. Mrs. Marguerite Butler resided in the city of New Orleans up to 1864, and from then in the parishes of Terre Bonne and Orleans.

10th. Of the minor children of Emanuel Burthe one—Estelle Burthe—was born in 1866 and Andre Burthe was born in or about 1868.

11th. And of the minor children of F. George Burthe the eldest—Marguerite Burthe—was born in 1865, Antoinette Burthe was born in 1866, and the others were born since 1866.

Claimant explains that he does not insert at the beginning of this memorial the names of the claimants joined, because he supposes that an award in favor of this claim would be made to him as executor of the estate of the said Louis Frederic Foucher, Marquis de Circé, deceased, the French citizen who was the original sufferer from the injuries complained of.

And claimant represents that to make an award of money in this case jointly to the long list of legatees of the Widow Foucher, Marquise de Circé, many of whom are minors, and their individual interest amounting to but a very small percentage, would produce, in all probability, extreme trouble and delay; that the money which may be awarded can and should be paid to the claimant in his aforesaid capacity of dative testamentary executor of the late Louis Frederic Foucher, Marquis de Circé; that in his said capacity claimant has a right to represent the parties in interest and to receive the moneys which may be awarded in favor of this claim; and claimant re-avers, as heretofore shown, that he has also a standing

133 before this honorable commission as the representative and duly qualified dative testamentary executor of the succession and estate of the late Mrs. Widow Louis Frederic Foucher, Marquise de Circé, with the consent, approval, and ratification of her said universal legatees, the parties hereinbefore named and joined as claimants herein.

Claimant further shows that this claim is asserted and prosecuted by him in his aforesaid fiduciary capacity and for the benefit of the parties in interest and with their knowledge, consent, and approbation.

Wherefore claimant prays this honorable commission to award to him, as the dative testamentary executor of the estate of Louis Frederic Foucher, Marquis de Circé, deceased, the sum of ten thousand seven hundred and fifty dollars in United States gold coin for the damage and injury caused the said L. F. Foucher by the dispos-

session of his said tenant as aforesaid and the occupation by the United States of his said land, with interest on said sum from August 20th, 1866, at the rate of six per centum per annum to the close of the commission, and also the sum of one hundred and one thousand nine hundred and ninety-nine dollars for the damage and injury—estimated at that amount in the legal-tender paper money of the United States—done said L. F. Foucher, Marquis de Circé, deceased, by the destruction, demolition, and injuries committed as aforesaid upon the buildings and other erections and improve-
133½ ments on his said land and the use of the materials thereof in the construction of the "Sedgwick hospital and barracks" and otherwise, with interest thereon from August 20th, 1866, at the rate of six per cent. per annum to the close of the commission.

And claimant further prays for all just and equitable relief.

Respectfully submitted,

ARTHUR DENIS,
Dative Testamentary Executor L. F. Foucher,
Marquis de Circé.

Witness:
CHAS. E. LETTEN.
HENRY CHIAPELLA.

STATE OF LOUISIANA, }
Parish of Orleans. }

Arthur Denis, being duly sworn, deposes and says that he is the duly appointed dative testamentary executor of the succession and estate of Louis Frederic Foucher, Marquis de Circé, deceased, and as such, is the claimant herein; that he has read the foregoing memorial and knows the contents thereof, and that the matters and things therein stated are truly stated to the best of his knowledge and belief.

ARTHUR DENIS.

Sworn to and subscribed before me this 30th day of May,
134 eighteen hundred and eighty-one.
[SEAL.] JULES MOSSY,
U. S. Com'r.

New Orleans, La.

135–144 "D." Filed 18th March, 1889, in supreme court of Louisiana, in original, with transcript.

Succession of L. F. FOUCHER DE CIRCE and of Mrs. L. F. FOUCHER DE CIRCE. } #10356.

Brief filed in evidence in supreme court March 18th, 1889.

Copy of Brief.

French and American Claims Commission.

ARTHUR DENIS, Dative Testamentary Executor of L. F. Foucher, Marquis de Circe,
vs.
THE UNITED STATES.
No. 603.

Brief for the claim.

Charles Adolphe de Chambrun, counsel for the French Republic; Edward Janin, private counsel.

* * * * * * *

145 It will be found that the claim was submitted in 1865 by Mr. Foucher's agent to the military claims commission at New Orleans, Mr. Foucher being himself in France and not being responsible for the details of the manner in which it was presented. It made no difference before that military commission whether a claimant was a citizen of the United States or a foreigner, and there is no ground, therefore, for suspecting Foucher's agent of any improper motive in speaking in his petition (Rec., 468) of Foucher as a citizen of the United States. It was simply a mistake.

On January the 26th, 1865, Major General Canby, as commanding general and head of the commission, made a report (Record, 58) recommending, upon the advice of Colonel Holabird, chief quartermaster (Rec., 471–476), the settlement of the claim as stated in the syllabus. General Canby's report and decision is found — Rec., 58. He decides—

That the property does not come within the definition of "abandoned property," but that, nevertheless, nothing should be allowed for the use of the property, which (p. 58), he says, had been occupied intermittently by the troops of the United States since soon after the first occupation of the city, in May, 1862, for military purposes nor for damages done to the property anterior to March 5, 1864,
146 "when," as he says, p. 58, "it was occupied permanently, and the structures now known as the 'Sedgwick hospital' were erected on it." His reason for rejecting all claim for use of or damage to the property anterior to March 5, 1864, is that (Rec., 58) "it was occupied by reason of a controlling military necessity, and was consequently a legitimate and proper occupation."

General Canby (as he states, Rec., 59) followed for the greater part, though not entirely, the advice of Colonel Holabird, chief quartermaster of the department of the Gulf, to whom he had referred the claim of Foucher "for full report and remark." (See Rec., 470, bottom of page.) Holabird, in his report, says (Rec., 474):

"What solution offers itself for the vexed question of damages, occupancy, and future use?

"1st. It is respectfully recommended that the same rule which

was applied to all property during the war occupied by the forces of the United States in the city of New Orleans be applied to this, and that all taxes upon this property be paid, with one and a half per centum upon the yearly assessed value of this property as rent up to June 30, 1865, and that this sum be increased by twenty thousand ($20,000) dollars, distributed over the months equally up to the 30th of June, 1865, when war rent ceased.

"2nd. From July 1st (1865) to the time when occupation shall cease it is recommended that 8 per cent. of the yearly assessed value be paid as rent in lieu of all other claims whatever.

"3d. That the claim for general damages should be thrown out, to be considered when all other claims of the like kind are considered in the States lately in rebellion."

On page 475 he states that the property was assessed at, in 1864 and 1865, $175,000.

147 It will be seen by a glance at page 473 that the $20,000 was for the damages done to the property, though he (Holabird) apparently speaks of the sum elsewhere as if he looked upon it as a sort of rent.

General Canby continues (Rec., 59) by saying that the permanent occupation of the place for a hospital should be regarded as the "occupation of private property for public use," and "that the owner is entitled to just compensation for that use from the date (March 5, 1864) of this occupation."

He approves the recommendation of the chief quartermaster, Holabird, to add twenty thousand for damages to the rent—that is, the rent between March 5, 1864, and June 30, 1865, at which latter date he says the "war rates terminated," the war rates being, as will be seen, very low rates. By recurring to Holabird's report to Canby on this claim (see the order to him to report, Rec., 470, bottom of page) it will be seen (Rec., 474) that Holabird recommends as the war-rate rent, from March 5, 1864, to June 30. 1865, one and a half per cent. per annum on the assessed value of the property (which in 1864 and 1865 (see Rec., 475) was $175,000) from March 5, 1864, to June 30, 1865, say sixteen months or one year and a third. The rent, then, for this war-rate period would be $3,500, to be added to $20,000 for damages; but, inasmuch as the United States still held the property at the date of Canby's report, Jan. 26, 1866, he recommends the allowance as rent subsequent to June 30, 1865 (when he says war rates terminated) at the increased rate of eight per cent. on

148 the assessed value of $175,000 until such time as the property should be vacated by the United States and restored to the owner (see Rec., 60, second and third lines), or, what amounts to the same thing, the United States should enter into a contract of lease with Foucher. There was some question for a time of the United States purchasing from Foucher that portion of the tract (which embraced in the whole, according to a report to Col. Holabird (Rec., 48–52) by one Engeman, about 420 arpents) on which stood the hospital buildings, but the price offered was too small, and finally the Government took a lease (Rec., 93) from Foucher from June 1, 1866, at $450 per month, of about thirty acres only of the

tract, being the portion where the hospital buildings and grounds were. The part which the United States had formerly used for a camp and hospital was some four hundred and twenty arpents, at least. (See Rec., 49.) An arpent of land in Louisiana is about five-sixths of an acre. (See Land Laws, Opinions, and Instructions; Washington, 1838; pages 715, 716.)

The rent, therefore, recommended by Canby of 8 per cent. on the assessed value of $175,000 (being at the rate of $14,000 per annum) ceased June 1, 1866. It had run from June 30, 1865, the date at which the war rate of only 1½ per cent. per annum on $175,000 had ceased—that is, eleven months—and amounted to $14,000 — $1,166.67 = $12,833.33.

The sums, then, recommended by General Canby to be paid by the United States to Foucher stand as follows:

149	Damages subsequent to March 5, 1864, by tearing down buildings to make room for the hospital buildings (including, probably, cutting down valuable trees)	$20,000 00
	Rent at the war rate of 1½ per cent. per annum on $175,000, the assessed value in 1864 and 1865, from March 5, 1864, to June 30, 1865, say sixteen months—one year and a third	3,500 00
	Rent from June 30, 1865, to June 1, 1866, at the rate of 8 per cent. per annum on $175,000, eleven months	12,833 33
	Total	$36,433 33

This report of Canby was addressed to the adjutant general's department, and was forwarded to Washington June 27, 1866. (See note at the bottom of the report, Rec., p. 60.)

No part of the money, however, was ever paid, because of the act of Congress of February 21, 1867 (14 Stat. L., p. 397, 398) which in effect forbade the "settlement of any claim for supplies or stores taken or furnished for the use of or used by the armies of the United States, nor for the occupation of or injury to real estate, nor for the consumption, appropriation, or destruction of or damage to personal property by the military authorities or troops of the United States, where such claim originated during the war for the suppression of the Southern rebellion," etc.

It may be noted here that Col. Holabird, the quartermaster, in his report to General Canby recommended (Rec., 474), besides the above allowances, the payment also of all taxes on the property. General Canby, however, makes no allowance at all for the taxes.

150–181 It is very important, too, to bear in mind that neither Holabird nor Canby allows a dollar for any damages or for any rent anterior to March 5, 1864, the date of Gen. Banks' order (Rec., 471) directing the permanent occupation of the land and the erection of a hospital.

Holabird simply recommends the postponement of the consideration of these damages. He says in his report (Rec., p. 473):

"It is proposed in this report to leave out of consideration the

general damage done by the troops to the grounds; for, if taken into account, it affects thousands of adjoining acres of land and many poor and wretched people, whose losses in proportion are far greater than those of the claimant."

And on Rec. p. 474 he recommends:

"3d. That the claim for the general damages should be thrown out, to be considered when all other claims of the like kind are considered in the States lately in rebellion."

General Canby, however, in his report recommends that all claim for these "general damages"—that is, the damages done by the United States troops and antecedently to the order of March 5, 1864—and all claim for rent before that time should be rejected at once and forever on the ground that (Rec., 58) "the original occupation of the property"—that is, of the whole tract of several hundred acres—"was a necessity growing out of the rebellion, and that for that occupation and the damages incident to it the Government of the United States is not responsible. The permanent occupation under the order of the department commander of March 5, 1864, stands in a different light."

* * * * * * *

182–206 The rest, or three-quarters of the claim, is owned by legatees who are not French citizens.

As to whether their share ought not likewise to go to the two legatees who are French citizens, we refer the commission to the observations of the honorable commissioner for France in his printed opinion in the Wiltz case. He says, page 6:

"Le seul moyen de ne pas arriver à des conséquences aussi monstrueuses, de rester dans l'intention du Traité, j'ajouterai dans la justice et le bon sens, c'est de payer au mort, par l'entremise de l'administrateur, ce qui eut été payé à sa personne s'il était vivant, ou dans le cas où l'on croirait absolument devoir faire une distinction entre les héritiers, d'attribuer au seul resté francais et jugé digne, la totalité du produit de la réclamation."

And on page 7 he says:

"Comme considération générale enfin, ce n'est pas la faute du Gouvernement Francais si depuis 20 ans, une partie des réclamants à disparu par la mort et le Gouvernement des Etats-Unis ne saurait être admis à bénéficier de sa négligence et du retard qu'il a mis à rendre justice, sans quoi un Gouvernement pourrait presque toujours, en ajournant pendant 20 ou 30 années un règlement de réclamations, se débarrasser de la plupart, ce qui est inadmissible."

* * * * * * *

207 Only two of the heirs are French. Their share is one-eighth each, or one-quarter jointly, $11,208.50, with interest from June 1, 1866, to the close of the commission.

Respectfully submitted,

CHARLES ADOLPHE DE CHAMBRUN,
Counsel for the French Republic.

EDWARD JANIN,
Private Counsel.

208–275 *The Final Report of the Agent and Counsel of the United States, with Treaties and Schedule of Claims. Document Filed February 7th*, 1889.

Washington, D. C.
Gibson Brothers, Printers.
1884.

* * * * * * *

276–283 Mr. President and gentlemen of the commission, I might very well have left all this to you without an observation on my own part. I fear that I may not have aided you at all in your deliberations, but for myself I have not a doubt that the treaty which is the law under which we are acting, construed according to the natural and reasonable and proper use of language, speaks in the present tense.

* * * * * * *

284 The majority of the commission, Baron de Arinos and Hon. A. O. Aldis, made a decision in the case as follows:

"WASHINGTON, *Jan'y* 19, 1882.

"Leon R. Delrieu, a French citizen, died at New Orleans April 15th, 1879. He was the original owner of this claim. He was a French citizen both at the time he suffered the loss and at the time he died.

"Pierre S. Wiltz, of New Orleans, files this claim as the duly appointed administrator of Delrieu. He states in the memorial that the present beneficial owners of the claim are the creditors and heirs of said Delrieu, 'who are legally represented by your memorialist.'

"He does not state that the creditors and heirs of Delrieu or any of them are French citizens.

"The counsel for the United States demurs on the ground that it does not appear from the memorial that the alleged beneficial owners of the claim are or ever were citizens of France.

285 He claims that this commission has no jurisdiction of a claim unless at least some one of the beneficial owners is a French citizen. He admits that the nationality of the administrator is of no account, for he has no beneficial interest and merely represents the real claimants.

"The counsel of France claims that as Delrieu was a French citizen at the time he suffered the loss and so continued up to the time of his death the administrator of his estate has the right to present and recover for the claim, although none of his creditors and heirs are French citizens.

"This is a question of jurisdiction.

"In deciding we must be governed by the language and meaning of the convention.

"We think that it was not enough that the deceased was a French citizen when he suffered the loss and when he died from it and that

his administrator presents the claim. It should further appear that the real and beneficial claimants, who will ultimately receive the amount that they may be allowed, are French citizens, and they must appear and present their claim. This appears to us to be the plain meaning of the first and second articles of the convention. They do not, in our judgment, admit of any other construction.

"We do not think it necessary at this time to make any further statement of the reasons for this decision.

"The demurrer is therefore sustained and the claim is disallowed."

286 Mr. Geofroy, the commissioner for the French Republic, filed an opinion dissenting from the decision of the committee, which is printed in the appendix and marked "Exhibit E." The opinion of Mr. Commissioner Aldis is also printed in the appendix and marked "Exhibit F."

Subsequently to these proceedings the counsel for the French Republic entered a motion to suspend so much of the decision rendered as disallowed the claim, and that the memorialist have twenty days to show the interests of French citizens. That motion was granted.

The said Wiltz submitted what was called "a reply to the demurrer," in which he set forth that certain persons who were citizens of France were the heirs and beneficial owners of the claim described in his memorial. The counsel for the United States objected to the further consideration of the case, first, upon the ground that the commission having decided that said Wiltz had no standing before the commission upon his memorial, inasmuch as the facts set forth therein were not sufficient to give the commission jurisdiction, neither he nor the counsel for the French Republic in his behalf could make any motion which involved the validity of the memorial; and, secondly, the counsel for the United States objected to the paper upon the ground that it did not authorize the said Wiltz to act for the persons who in the paper were alleged to be the heirs of Delrieu and the beneficiaries of the claim, if any allowance should be made.

287 When the motion to suspend the decision was made—January 19, 1882—the time within which, under the treaty, memorials could be filed had passed, and it was contended by the counsel for the United States that it was not competent for the commission to permit any amendment of or to allow any motion in reference to the memorial filed originally by Wiltz, as any motion which operated to revive that memorial and to give Wiltz a standing before the commission would be equivalent to the allowance of a new memorial.

The counsel for the French Republic claimed that the paper filed the 28th of January, 1882, was a compliance with the decision of the commission and it was not an amendment to the memorial. He contended that the two conditions required by the convention had been complied with, namely, that the claim was a French claim in its inception, and that it was then a French claim, as it was owned by French parties, it having "descended from Delrieu, whose heirs now appear before the commission." The counsel for the French

Republic also relied upon the stipulation between the counsel for the two governments, in which it was agreed that, upon the reassembling of the commission in the autumn of 1881, the counsel for the two governments would be prepared to submit briefs upon demurrer in cases that represented classes of claims and in cases deemed important by the counsel for either government.

"Before the French and American Claims Commission, upon the motion of the counsel for France to suspend the order dis-
288–320 allowing the claim and permit the 'reply to the demurrer' of the administrator, stating that there are two heirs of the deceased Delrieu living in France who are French citizens and for whom he wishes to appear, to be filed and for the administrator to appear for them—

"It is ordered that the motion be denied and the amendment or 'reply to the demurrer' by which the administrator appears for the two heirs, instead of their appearing for themselves, is rejected, and the decision of the commission that the claim of the administrator be disallowed is confirmed."

The proceedings in the case of Wiltz and the decision of the majority of the commission justify the following conclusion:

1. That in the case of the death of a claimant it was competent for his legal representative to appear and prosecute the claim and that without reference to the nationality of the representative.

2. In order that jurisdiction should be taken by the commission it was necessary that the memorial should set forth as facts (1) that the descendant was at the time the loss occurred or the injury was sustained a citizen of the country prosecuting the claim; (2) that the heirs or legatees who would receive the benefits of any award that might be made were also citizens of the same country at the time the treaty was ratified, and (3) that the memorialist was duly authorized to appear in behalf of the beneficiaries.

* * * * * * *

321 *Copy of Petition for Writ of Error.*

Supreme Court of Louisiana.

Successions of L. F. FOUCHER DE CIRCÉ and of Mrs. L. F. FOUCHER DE CIRCÉ, Consolidated. } No. 10356.

To the Honorable Edward Bermudez, chief justice of the supreme court of the State of Louisiana:

The petition of Paul Louis Burthe and Dominique Francois Burthe, both residents of the Republic of France, respectfully represents—

That in the cause entitled and numbered as above on the docket of the honorable the supreme court of Louisiana a final judgment was rendered on the 20th day of May, 1889, in favor of Arthur Denis, dative testamentary executor of the successions of L. F.

Foucher de Circé and Mrs. L. F. Foucher de Circé, homologating and approving the account and tableau filed by him, dismissing an opposition filed by your petitioners to said account and tableau, and directing the money and funds referred to therein to be distributed among the parties therein named, to wit: Mrs. Louise Burthe, in her own right and as tutrix of the minor children of Edmond Burthe; Mrs. Felicie Brierre, Delord Burthe, Louis Burthe, L. Andre Burthe, Thomas Butler, tutor of the minor children of Mrs. Marguerite Butler; Mrs. Mary Burthe, tutrix of the minor children of George Burthe; Miss Marie Antoinette Burthe, Miss Estelle Marguerite Burthe, Miss Marie Estelle Burthe, M. Andre Burthe, Paul Louis Burthe, and Dominique Francois Burthe, the two last being your petitioners, and the amount proposed to be paid over to each of said petitioners being one-eighth of the amount proposed to be distributed in said account and tableau.

That the whole of said money and funds were claimed by your petitioners in their said opposition to said account and tab-
322 leau, and the said judgment and decree was and is adverse to the claims of your petitioners, and said matter was decided adversely to your petitioners.

That on the 31st May, 1889, said honorable court refused to grant a rehearing in said case, and the judgment of said court has now become final.

That said final judgment and decree has been rendered by the highest court of the State of Louisiana and by the highest court in which a decision could be had in said State in regard to the matters pending and at issue in said cause.

That in said suit and proceedings there was drawn in question the validity of an authority exercised under the State of Louisiana—the authority to distribute said fund as proposed by said executor—on the ground of its being repugnant to the Constitution, treaties, and laws of the United States, and especially the treaties hereinafter mentioned, and the decision of said honorable court was in favor of such validity.

That your petitioners, opponents as aforesaid, claimed in said suit and proceedings a right, title, and privilege under a certain treaty between the Republic of France and the United States of America, dated 15th January, 1880, and treaties supplemental thereto, and under the Constitution and the statutes of the United States, and under the authority of a commission created by and exercising power under the United States, and the decision of said honorable court was against the right, title, and privilege specially set up and claimed by your petitioners under said treaties, Constitution, and statutes.

That in said suits and proceedings there was drawn in question the construction of a clause and provision of the treaties of the United States aforesaid and the meaning and import of an award made by the commission created by and under said treaties and exercising authority under the United States, and your peti-
323 tioners, opponents as aforesaid, specially claimed and set up a right, title, and privilege under said clause and provision

of said treaties and under said award, and the decision of said honorable court was against the right, title, and privilege specially claimed and set up as aforesaid; and

That your petitioners desire to take a writ of error from said decree and judgment to the Supreme Court of the United States according to law.

And your petitioners further show that since said Arthur Denis, dative testamentary executor, etc., filed said account and tableau in the court having original jurisdiction thereof—the civil district court for the parish of Orleans—three persons having an interest in the matter, who were minors at the time said account and tableau was filed, have been fully emancipated and relieved of all the disabilities which attach to minors, with full power to do and perform all acts as fully as if they had arrived at the age of twenty-one years, said minors being named Maude Burthe, Victor Burthe, and Adele Burthe, and having been represented when said account was originally filed by Mrs. Mary Burthe, their tutrix, and that another person having an interest in the matter, who was a minor when said account and tableau was originally filed, has become of age, to wit, Miss Louise Butler, represented, when said account and tableau was filed, by Thomas Butler, dative tutor, and that said Miss Maude Butler, Victor Burthe, Miss Adele Burthe, and Miss Louise Butler should be made parties hereto.

In order, therefore, that your petitioners may obtain relief in the premises they pray that your honor will allow a writ of error to the Supreme Court of the United States from said honorable court, returnable according to law, to the end that the said judgment may be re-examined and reversed, and that your honor will sign writs and citations to the said parties and to all other parties inter-
324 ested in said suit, and especially—

To Arthur Denis, dative testamentary executor of the successions of L. F. Foucher de Circé and of Mrs. L. F. Foucher de Circé;

To Mrs. Louise Burthe, widow of Edmond Burthe, in her own right and as tutrix of the minor children of Edmond Burthe;

To Mrs. Felicie Brierre, wife of Maurice E. Brierre;

To Maurice E. Brierre, to authorize and assist his said wife;

To Delord Burthe;

To Louis Burthe;

To L. Andre Burthe;

To Thomas Butler, dative tutor of the minor children of Mrs. Marguerite Butler;

To Mrs. Mary Burthe, widow of George Burthe and tutrix of the minor children of George Burthe;

To Miss Marie Antoinette Burthe;

To Miss Estelle Marguerite Burthe;

To Miss Marie Estelle Burthe;

To M. Andre Burthe;

— Miss Maude Burthe;

To Victor Burthe;

To Miss Adele Burthe, and

To Miss Louise Butler;

And that your honor will order that said writ of error shall operate as a supersedeas, and shall stay all further action in the premises and in the distribution of the fund now in controversy until a judgment shall be rendered by the Supreme Court of the United States in the cause;

And that your honor will approve the bond herewith submitted, in accordance with the statutes of the United States, and do and perform whatever may be required, so that speedy justice may be done.

(Signed) CHARLES CARROLL,
HENRY DENIS,
Att'ys for Petitioners.

325 *Affidavit.*

Charles Carroll, being sworn, deposes and says that the above-named petitioners reside in the Republic of France; that neither of them is now in the State of Louisiana to make this affidavit in person; that he is the attorney-at-law of said petitioners, and that, to the best of his knowledge, information, and belief, all the facts set forth in the foregoing petition are true.

(Signed) CHARLES CARROLL.

Sworn to and subscribed before me this 31st day of May, 1889.

(Signed) JOSEPH F. POCHÉ, *Clerk.*

326 *Order Granting Writ of Error.*

Although I doubt that a writ lies in this case, I allow it, as the Supreme Court of the United States may deem otherwise.

It is ordered that the writ be allowed and issue on the plaintiffs in error giving bond and surety, conditioned as the law directs, for eight thousand dollars.

New Orleans, June 3rd, 1889.

(Signed) E. BERMUDEZ,
Chief Justice of the Supreme Court of the State of Louisiana.

327 *Copy of Writ Lodged in Clerk's Office.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Louisiana, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had *and* the said suit and proceedings No. 10356 of the docket of said supreme court of Louisiana, wherein Arthur Denis, dative testamentary executor of the successions of L. F. Foucher de Circé and of Mrs.

L. F. Foucher de Circé, consolidated, has filed a certain account and tableau proposing to distribute the fund therein referred to among the parties named in said account and tableau, and wherein Paul Louis Burthe and Dominique Francois Burthe have filed oppositions and objections to said account and tableau, claiming the whole of the amount therein referred to under the Constitution and statutes and under a treaty of the United States, and wherein final judgment has been rendered by said court against said Paul Louis Burthe and Dominique Francois Burthe, said judgment having dismissed their opposition and approved and homologated said account and tableau, and having been in favor of said Arthur Denis, dative testamentary executor as aforesaid, and the beneficiaries and parties in interest thereunder, being Mrs. Louise Burthe, widow of Edmond Burthe, in her own right and as tutrix of the minor children born of her marriage with Edmond Burthe; Mrs. Felicie Brierre, wife of Maurice E. Brierre; said Maurice E. Brierre, Delord Burthe, Louis Burthe, L. Andre Burthe, Thomas Butler, dative tutor of the minor children of Mrs. Mar-
328 guerite Butler; Mrs. Mary Burthe, widow of George Burthe and tutrix of the minor children born of her marriage with George Burthe—Miss Marie Antoinette Burthe, Miss Estelle Marguerite Burthe, Miss Marie Estelle Burthe, M. Andre Burthe, Miss Maude Burthe, Victor Burthe, Miss Adele Burthe, and Miss Louise Butler—said judgment having been rendered on the 20th May, 1889, and a rehearing in said matter having been refused on 31st May, 1889, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of an authority exercised under said *state* on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, or where a right, title, and privilege was and is claimed under the Constitution, treaties, and statutes of and under an authority exercised under the United States and the decision was against the right, title, and privilege specially set up and claimed under such Constitution, treaties, statutes, and authority, a manifest error hath happened, to the great damage of said Paul Louise Burthe and Dominique Francois Burthe, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judg-
ment be therein given, that then, under your seal, distinctly
329 and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and pro-

ceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the third day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by—
(Signed) E. BERMUDEZ,
Chief Justice of Supreme Court of Louisiana.

330 Supreme Court of Louisiana.

Successions of L. F. FOUCHER DE CIRCÉ and of Mrs. L. F. FOUCHER DE CIRCÉ. } No. 10356.

Assignment of Errors.

And now, by their undersigned counsel, come Paul Louis Burthe and Dominique Francois Burthe and, respectfully showing that they are advised that there is error to their prejudice in the final decree of the honorable the supreme court of Louisiana in the matter numbered and entitled as above, humbly tender this their assignment of errors.

1. The said honorable court erred in dealing with the fund in controversy herein as if the same were an ordinary asset of the succession of Mrs. L. F. Foucher de Circé to be distributed without reference to the source from which the fund came and to the conditions under which it was collected, whereas said fund having been derived and collected from the United States solely and only through and under an award rendered under certain treaty between the republic of France and the United States, dated 15th of January, 1880, and treaties supplemental thereto, the same should be disposed of and distributed only in such manner as was and is provided in said treaties and only to such persons as were and are empowered and entitled to take and receive thereunder.

2. Inasmuch as under the treaties aforesaid and under the rulings of the commission created thereby and under the award rendered by said commission, through and by which alone said fund in controversy herein was collected and realized, no persons except French citizens are or were entitled to take or receive said fund or any part thereof, and inasmuch as none of the persons claiming said fund or any part thereof and none of the persons among whom it is proposed by said decree to distribute the same were or are

331 French citizens save the said opponents, the said honorable court also erred in declaring, decreeing, and adjudging that said fund or a part thereof should be distributed among the persons

and distributees named in the account and tableau filed by the dative testamentary executor of the above-named deceased other than said opponents, all of said persons and distributees other than said opponents being citizens and residents of the United States of America, and none of them being entitled or authorized to take or to receive said fund under said treaties or under the rulings and award of said commission created thereby.

3. The said honorable supreme court of Louisiana, dealing with a fund collected from the United States under an award rendered by a commission created under the treaties aforesaid and exercising authority under the United States of America, which contemplate and provide for no payment except to citizens of France, has erred and has violated and nullified the provisions of said treaties, and has rendered invalid the authority exercised under the United States by its judgment and decree, which distributes three-fourths of the fund so collected among persons who are not citizens of France.

4. The said honorable supreme court of Louisiana has erred in declaring in effect in and by its judgment and decree that the award aforesaid of the fund now in controversy was made simply to the legal representative of a deceased person, simply to a dative testamentary executor, whereas in point of fact said award, being the award under which the United States paid over the fund now in controversy, could not under the treaties aforesaid have been made and paid in favor of any executor except in so far as he represented French citizens, and said award was made either to Arthur Denis, agent of said opponents, or to Arthur Denis, executor, impressed with a trust in favor of said opponents, said trust arising under and resulting from the treaties aforesaid, and especially the condi-
332 tion and stipulation therein limiting payment to citizens of France and arising under and resulting from the Constitution and statutes of the United States, and especially the statutes referring to said treaties, which facts and trust were and have been disregarded by said honorable court in said judgment.

5. While Madam Foucher, the deceased, could bequeath any right or claim belonging to her to any one she pleased, as declared by the said honorable supreme court of Louisiana in its decree, yet no legatee named by her could take or receive any part of a fund collected under a treaty unless such legatee was authorized and empowered and entitled to take and receive under such treaty, and said honorable court erred in decreeing that all the legatees of Madam Foucher should share in the fund collected under the treaties aforesaid, when none of said legatees were or are French citizens save said opponents and when the award made under said treaties covered only such portion of the entire claim as belonged to said opponents, said award leaving the other legatees of said Madam Foucher where they would have been had there not been the treaties aforesaid.

6. The said opponents claim the fund in controversy as legatees of Madam Foucher and also under the rights given them as French citizens by and under the treaties aforesaid, and the said supreme court of Louisiana erred in not considering and giving effect to their claim under said treaties.

7. Under the terms of the treaties aforesaid between the United States and France neither country could recover from the other any award, except where the actual claimants, by whatever title, whether by descent, devise, or conveyance, were at the date of the award citizens of the country recovering, and at the date of the award of the fund in controversy against the United States no person in interest or claimant, save said opponents, was a citizen of France and no award was made or could have been made save to them ; and said supreme court of Louisiana erred in denying the claims of
333 said opponents for the whole of said award.

8. The award aforesaid settled nothing but the amount and validity of the claim as between the two nations, leaving open the question as to what parties are actually entitled to the sum awarded, and the provisions of the treaties aforesaid and the rulings of said commission establish that said opponents are and were the parties actually entitled to said amount, and said honorable supreme court of Louisiana erred in not adjudging and decreeing that the whole amount of the fund awarded should be paid to said opponents.

9. It is abundantly shown that said opponents were the only French citizens interested in the claim pending before the commission aforesaid created by and under said treaties; that the claim to the extent of the interest of the parties in interest, who were not French citizens, was substantially abandoned, and that the amount awarded is and was really only that proportion of the total claim that fell to said opponents, and said honorable supreme court of Louisiana erred in decreeing that said fund should be distributed among the persons who were and are not citizens of France, and as to whom the claim had been abandoned before the commission organized under the treaties aforesaid.

10. In prosecuting the claim for damages under said treaties the executor of the deceased acted not only in that capacity but also as attorney-in-fact of all the legatees, including the said opponents, and it is incumbent upon him to pay the sum realized to the parties legally entitled to it and for whose benefits the award was made, said parties being the above-named opponents, and said honorable supreme court of Louisiana erred in not decreeing that they and they alone should receive the said fund in controversy.

11. The supreme court of Louisiana is in error in basing its adjudication of the rights of the parties to this controversy upon
334 the fact that they are all the legatees of the Marquise Foucher de Circé, and that as such they must take under her will, even in the distribution of the fund derived from the treaty, in the manner and proportions prescribed in said will, said court creating and declaring in this respect, between universal legatees or testamentary heirs and heirs-at-law, a difference which does not exist in the premises. The said opponents are entitled to the award of the commissioners, because they are testamentary heirs. If they were not heirs at all, legal or testamentary, clearly they would have no rights in the matter, but it is not enough that they should be heirs; they

must also and besides be French citizens. In other words, the treaty has coupled the condition of their French citizenship to their quality of heir in awarding the indemnity to them. The position of all the parties before the court is therefore precisely the same as if they claimed not under the will, but as heirs-at-law.

Wherefore said opponents pray that this their assignment of errors may be filed and made a part of the record in the said proceedings numbered and entitled as above.

And as in duty bound, etc.

(Signed) CHARLES CARROLL,
(Signed) HENRY DENIS,
Att'ys for Paul Louis Burthe and Dominique Francois Burthe.

335 *Bond for Writ of Error.*

Know all men by these presents that we, Paul Louis Burthe and Dominique Francois Burthe, both residing in the Republic of France, as principals, and Emile Tanneret, of New Orleans, State of Louisiana, as surety, are held and firmly bound unto Arthur Denis, dative testamentary executor of the successions of L. F. Foucher de Circé and of Mrs. L. F. Furcher de Circé, consolidated, and unto Mrs. Louise Burthe, widow of Edmond Burthe, in her own right and as tutrix of the minor children born of her marriage with said Edmond Burthe; Mrs. Felicie Brierre, wife of Maurice E. Brierre; Maurice E. Brierre, Delord Burthe, Louis Burthe, L. Andre Burthe, Thomas Butler, dative tutor of the minor children of Mrs. Marguerite Butler; Mrs. Mary Burthe, widow of George Burthe and tutrix of the minor children born of her marriags with said George Burthe; Miss Marie Antoinette Burthe, Miss Estelle Marguerite Burthe, Miss Marie Estelle Burthe, M. Andre Burthe, Miss Maude Burthe, Victor Burthe, Miss Adele Burthe, and Miss Louise Butler, *in solido*, and unto any and all parties in interest in the suit mentioned in the condition of this bond, in the full and just sum of eight thousand dollars ($8,000), to be paid to the said Arthur Denis, dative testamentary executor of the successions of L. F. Foucher de Circé and of Mrs. L. F. Foucher de Circé, consolidated, said Mrs. Louise Burthe in her own right and as tutrix of the minor children born of her marriage with Edmond Burthe, said Mrs. Felicie Brierre, wife of Maurice E. Brierre; said Maurice E. Brierre, said Delord Burthe, said Louis Burthe, said L. Andre Burthe, said Thomas Butler, dative tutor of the minor children of Mrs. Marguerite Butler; said Mrs. Mary Burthe, tutrix of the minor children born of her marriage with George Burthe; said Miss Estelle Marguerite Burthe, said Miss Marie Antoinette Burthe, said Miss Marie Estelle Burthe, said
M. Andre Burthe, said Miss Maude Burthe, said Victor Burthe,
336 said Miss Adele Burthe, said Louise Butler, and all other parties in interest, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we

bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this third day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas, lately at a session of the supreme court of Louisiana, held at New Orleans on the 20th of May, 1889, in a suit and proceedings depending in said supreme court, wherein Arthur Denis, dative testamentary executor, filed a certain account and tableau for the distribution and disposition of certain funds, to which account and tableau said Paul Louis Burthe and Dominique Francois Burthe filed objections and oppositions, and in which account and tableau and funds therein proposed to be distributed said Mrs. Louise Burthe, in her own right and as tutrix of the minor children born of her marriage with Edmond Burthe; Mrs. Felicie Brierre, wife of Maurice E. Brierre; Maurice E. Brierre, Delord Burthe, Louis Burthe, L. Andre Burthe, Thomas Butler, dative tutor of the minor children of Mrs. Marguerite Butler; Mrs. Mary Burthe, tutrix of the minor children born of her marriage with George Burthe; Miss Marie Antoinette Burthe, Miss Estelle Marguerite Burthe, Miss Marie Estelle Burthe, M. Andre Burthe, Miss Maude Burthe, Victor Burthe, Miss Adele Burthe, and Miss Louise Butler had and have an interest—said proceedings being No. 10356 of the docket of said court—judgment was rendered against the said opponents, Paul Louis Burthe and Dominique Francois Burthe, and approving and homologating said account and tableau and decreeing said fund to be distributed as therein proposed, said judgment having been rendered on 20th May, 1889, and a rehearing having been refused in said matter on 31st May, 1889, and said judg-
337 ment being now final: and whereas said opponents have obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation, directed to said Arthur Denis, dative testamentary executor of L. F. Foucher de Circé and of Mrs. L. F. Foucher de Circé; said Mrs. Louis Burthe, widow of Edmond Burthe, in her own right and as tutrix of the minor children born of her marriage with said Edmond Burthe; said Mrs. Felicie Brierre, wife of Maurice E. Brierre; said Maurice E. Brierre, said Delord Burthe, said Louis Burthe, said L. Andre Burthe, said Thomas Butler, dative tutor of the minor children of Mrs. Marguerite Butler; said Mrs. Mary Burthe, widow of George Burthe and tutrix of the minor children born of her marriage with George Burthe; said Miss Marie Antoinette Burthe, said Miss Estelle Marguerite Burthe, said Miss Marie Estelle Burthe, said M. Andre Burthe, said Miss Maude Burthe, said Victor Burthe, said Miss Adele Burthe, and said Miss Louise Butler and all others concerned, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday in October next:

Now, the condition of the above obligation is such that if the said Paul Louis Burthe and Dominique Francois Burthe, opponents, shall prosecute said writ to effect and answer all damages and costs if

they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) PAUL LOUIS BURTHE,
By his attorney-at-law, CHARLES CARROLL.
DOMINIQUE FRANCOIS BURTHE,
By his attorney-at-law, CHARLES CARROLL.
E. TANNERET.

Sealed and delivered in the presence of—

(Signed) THEO. SPITZFADEN.

Approved:

(Signed) E. BERMUDEZ,
Chief Justice Supreme Court of Louisiana.

338 Emile Tanneret, surety on the above and foregoing bond, being duly sworn, deposes and says that he resides in the city of New Orleans, State of Louisiana, and that he is well worth the sum of eight thousand dollars after the payment of his debts and liabilities.

(Signed) E. TANNERET.

Sworn to and subscribed before me this 3rd day of June, 1889.

[SEAL.] (Signed) JOSEPH F. POCHE, *Clerk.*

339 *Acknowledgment of Service of Citations.*

Notice of writ of error allowed herein acknowledged and service of the citations in this cause acknowledged.

New Orleans, June 4th, 1889.

HENRY CHIAPELLA,
Attorney for Arthur Denis, dative testamentary executor of the successions of L. F. Foucher de Circe and of Mrs. L. F. Foucher de Circe and for all parties (except P. L. Burthe and D. F. Burthe) in interest under the account and tableau filed by the said dative testamentary executor, and for Mrs. Louise Burthe, widow of Edmond Burthe, in her own right and as tutrix of the minor children born of her marriage with Edmond Burthe; Mrs. Felicie Brierre, wife of Maurice E. Brierre; said Maurice E. Brierre, Delord Burthe, Louis Burthe, L. Andre Burthe, Thomas Butler, dative tutor of the minor children of Mrs. Marguerite Butler; Mrs. Mary Burthe, widow of George Burthe and tutrix of the minor children born of her marriage with George Burthe; Miss Marie Antoinette Burthe, Miss Estelle Marguerite Burthe, Miss Marie Estelle Burthe, M. Andre Burthe, Miss Maude Burthe, Victor Burthe, Miss Adele Burthe, and Miss Louise Butler.

340 UNITED STATES OF AMERICA, *ss :*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Louisiana, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit and proceedings No. 10356 of the docket of said supreme court of Louisiana, wherein Arthur Denis, dative testamentary executor of the successions of L. F. Foucher de Circe and of Mrs. L. F. Foucher de Circe, consolidated, has filed a certain account and tableau proposing to distribute the fund therein referred to among the parties named in said account and tableau, and wherein Paul Louis Burthe and Dominique Francois Burthe have filed oppositions and objections to said account and tableau, claiming the whole of the amount therein referred to under the Constitution and statutes and under a treaty of the United States, and wherein final judgment has been rendered by said court against said Paul Louis Burthe and Dominique Francois Burthe, said judgment having dismissed their opposition and approved and homologated said account and tableau, and having been in favor of said Arthur Denis, dative testamentary executor as aforesaid, and the beneficiaries and parties in interest thereunder being Mrs. Louise Burthe, widow of Edmond Burthe, in her own right and as tutrix of the minor children born of her marriage with Edmond Burthe; Mrs. Felicie Brierre, wife of Maurice E. Brierre; said Maurice E. Brierre,
341 Delord Burthe, Louis Burthe, L. Andre Burthe, Thomas Butler, dative tutor of the minor children of Mrs. Marguerite Butler; Mrs. Mary Burthe, widow of George Burthe and tutrix of the minor children born of her marriage with George Burthe; Miss Marie Antoinette Burthe, Miss Estelle Marguerite Burthe, Miss Marie Estelle Burthe, M. Andre Burthe, Miss Maude Burthe, Victor Burthe, Miss Adele Burthe, and Miss Louise Butler, said judgment having been rendered on 20th May, 1889, and a rehearing in said matter having been refused on 31st May, 1889, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; or where a right, title, and privilege was and is claimed under the Constitution, treaties, and statutes of and under an authority exercised under the United States and the decision was against the right, title, and privilege specially set up and claimed under such Constitution, treaties,

statutes, and authority, a manifest error hath happened, to the great damage of the said Paul Louis Burthe and Dominique Francois Burthe, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy
342 justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the third day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by—
E. BERMUDEZ,
Chief Justice Supreme Court of Louisiana.

342½ [Endorsed:] Supreme Court of Louisiana. Filed Jun- 3 1889. Joseph F. Poché, clerk.

343 *Acknowledgment of Service of Citations.*

Notice of writ of error allowed herein acknowledged and service of the citations in this cause acknowledged.

New Orleans, June 4th, 1889.

HENRY CHIAPELLA,
Attorney for Arthur Denis, dative testamentary executor of the successions of L. F. Fourcher de Circe and of Mrs. L. F. Foucher de Circe and for all parties (except P. L. Burthe and D. F. Burthe) in interest under the account and tableau filed by the said dative testamentary executor, and for Mrs. Louise Burthe, widow of Edmond Burthe, in her own right and as tutrix of the minor children born of her marriage with Edmond Burthe; Mrs. Felicie Brierre, wife of Maurice E. Brierre; said Maurice E. Brierre, Delord Burthe, Louis Burthe, L. Andre Burthe, Thomas Butler, dative tutor of the minor children of Mrs. Marguerite Butler; Mrs. Mary Burthe, widow of George Burthe and tutrix of the minor children born of her marriage with George Burthe; Miss Marie Antoinette Burthe, Miss Estelle Marguerite Burthe, Miss Marie Estelle Burthe, M. Andre Burthe, Miss Maude Burthe, Victor Burthe, Miss Adele Burthe, and Miss Louise Butler.

[Endorsed:] Supreme court of Louisiana. Filed Jun- 4, 1889. Joseph F. Poché, clerk.

344 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of the State of Louisiana.

I, Joseph F. Poche, clerk of the supreme court of the State of Louisiana, holding sessions in the city of New Orleans, do hereby certify the foregoing three hundred & forty-three pages contain a full, true, and complete transcript of the proceedings had in the civil district court for the parish of Orleans entitled "Succession of L. F. Foucher de Circé and Succession of Mrs. L. F. Foucher de Circé, consolidated," which record is on the files of this court under the number 10356, wherein Paul Louis Burthe and Francois Burthe are opponents and Arthur Denis dative testamentary executor, and also a true copy of all the proceedings had in this honorable court on appeal taken by said Arthur Denis, dative testamentary executor.

Seal Supreme Court of the State of Louisiana.

In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this 26th day of September, A. D. 1889, and in the 113th year of the Independence of the United States of America.

JOSEPH F. POCHÉ, *Clerk.*

Certificate of Presiding Justice.

I, Felix P. Poche, senior associate justice of the supreme court of the State of Louisiana, certify that Edward Bermudez, chief justice of this court, is now absent from the State; that Joseph F. Poche is clerk of the supreme court of the State of Louisiana, holding
345 sessions at the city of New Orleans; that the signature of Joseph F. Poche to the within certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all his official acts as such.

Seal Supreme Court of the State of Louisiana.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this 26th day of September, A. D. 1889, and in the 113th year of the Independence of the United States of America.

F. P. POCHÉ.

346 In the Supreme Court of the United States. October Term, 1889.

BURTHE and BURTHE, Plaintiffs in Error,
vs.
ARTHUR DENIS (Dative Testamentary Executor), Defendant in Error. } No. 1381.

It is hereby stipulated and agreed that the pages and portions of the transcript of record in above-entitled cause as hereinu-der indicated may be omitted in the printed record.

HENRY CHIAPELLA,
Of Counsel for Def'ts in Error.
ALEX. PORTER MORSE,
Of Counsel for Plaintiffs in Error.

Washington, Nov. 5, 1889.

From page 72 to page 89, both inclusive.
From page 99 to & inclusive of page 107.
" " 136 " " " " 144 and the first three lines on page 145.
" " 151 to & inclusive of page 181 and the first four lines on page 182.
" the last line on page 182 to & inclusive of the fourteenth line on page 207.
" page 209 to & inclusive of page 275 and the first line on page 276.
" the seventh line on page 276 to & inclusive of line ten, on page 284.
" page 289 to 320, inclusive.

347 [Endorsed:] In the Supreme Court of the United States. (October term, 1889.) Paul Louis Burthe and Dominique Burthe, plaintiffs in error, *vs.* Arthur Denis (dative testamentary executor of Foucher de Circe), defendant in error. No. 1381. Stipulation of counsel as to printing record.

348 [Endorsed:] Supreme Court U. S. 1889, October term. No. 1381. Paul Louis Burthe *et al.*, pl'ffs in error, *vs.* Arthur Denis, D. T. ex'c'r, &c. Stipulation to omit parts of record in printing.

[Stamped:] Office Supreme Court U. S. Filed Nov. 7, 1889. James H. McKenney, clerk.

Endorsed on cover: Louisiana supreme court. No. 1381. Paul Louis Burthe and Dominique Francois Burthe, plaintiffs in error, *vs.* Arthur Denis, dative testamentary executor of the successions of L. F. Foucher de Circé and Mrs. L. F. Foucher de Circé. Filed October 16, 1889.

346

Office Supreme Court U. S.
FILED.
JAN 10 1890
JAMES H. McKENNEY
CLERK.

Supreme Court of the United States.

October Term, 1889.

No. 1381.

PAUL LOUIS BURTHE AND DOMINIQUE FRANÇOIS BURTHE, PLAINTIFFS IN ERROR,

v.

ARTHUR DENIS, DATIVE TESTAMENTARY EXECUTOR OF THE SUCCESSIONS OF L. F. FOUCHER DE CIRCÉ AND MRS. L. F. FOUCHER DE CIRCÉ.

In Error to the Supreme Court of the State of Louisiana.

BRIEF FOR PLAINTIFFS IN ERROR.

Submitted Under the Twentieth Rule.

CHARLES CARROLL,
ALEX. PORTER MORSE,
Counsel for Plaintiffs in Error,
1505 Penna. Avenue,
Washington, D. C., *December, 1889.*

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1381.

PAUL LOUIS BURTHE AND DOMINIQUE FRANÇOIS BURTHE, PLAINTIFFS IN ERROR,

v.

ARTHUR DENIS, DATIVE TESTAMENTARY EXECUTOR OF THE SUCCESSIONS OF L. F. FOUCHER DE CIRCÉ AND MRS. L. F. FOUCHER DE CIRCÉ.

In Error to the Supreme Court of the State of Louisiana.

BRIEF FOR PLAINTIFFS IN ERROR.

I. STATEMENT OF THE CASE.

At the beginning of the late war between the States, L. F. Foucher, Marquis de Circé, owned the Foucher plantation, situated on the east bank of the Mississippi, about five miles above Canal street, New Orleans, which plantation is within the limits of the corporation and part of which is known as Exposition Park, or Audubon Park. Mr. Foucher was a subject of the Emperor of France, residing in the city of Paris, where he lived until the time of his death.

During the war this property was taken possession of by the Federal troops. A hospital was built upon one part of the tract; some of the fields were taken as pastures, while others were converted into camps; and the whole plantation was for a time out of the possession of its owner. In 1865 a claim for reimbursement was presented to the Military Claims Commission, sitting at New Orleans, of which Major General Canby was the head. After some time General Canby made a report in which he recommended payment of $36,433.33 as compensation for the damage done to the plantation. (See Record, pages 42 to 55, memorial filed with French-American Claims Commission, offered for plaintiffs in error, and also for A. Denis, executor, etc.; see, also, reference to General Canby's report, Record, page 58.)

The Marquis de Circé died in 1869, leaving a will in which he instituted his widow, the Marquise de Circé, also a citizen of France, his universal legatee, and in due course she was placed in possession of his estate. (Record, page 8.)

In 1877 the Marquise died in Paris, leaving a last will and testament, by which she bequeathed her entire estate to her nephews and nieces, who were appointed her universal legatees conjointly. (Record, page 8.) This will was not deemed to be entirely clear and certain in its provisions and gave rise to litigation (reported at page 568, 31st Louisiana Annual Reports), after the termination of which the legatees of the Marquise went into possession of her estate. (Record, page 8.)

The estates of the Marquis and Marquise were settled, the funds and property distributed among the legatees of the latter (some of these legatees, having died, were represented by their heirs), the executors were discharged, and both successions were considered as having been finally closed. (Record, pages 9, 49, and 50.)

During all this time the Government of the United States had failed to repair the loss and damage occasioned by the wrongful acts of the Federal troops. The Marquis de Circé and his wife both died without receiving any compensation for the damage to their plantation. (Record, page 12.)

In 1880, under a Convention between the Republics of the United States and France, there was established the "French and American Claims Commission," which was authorized to pass upon "all claims on the part of corporations, companies, or private individuals, citizens of France, upon (against) the Government of the United States, arising out of acts committed against the persons or property of citizens of France, not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same, by the civil or military authorities of the Government of the United States, upon the high seas or within the territorial jurisdiction of the United States, during the period comprised between the thirteenth day of April, eighteen hundred and sixty-one, and the twentieth day of August, eighteen hundred and sixty-six." (See Treaty, Articles I and II. Treaties and Conventions between the United States and other powers, p. 356, *et seq.*)

The damage sustained by the Marquis de Circé was suffered within the period named in this treaty. (See Record, page 12.)

When this treaty was adopted, the Commission established as one of its rules that any claim on behalf of an estate, or succession, or deceased person, should be made by the executor or administrator. (See Rule I, Record, page 38.) The successions of Mr. and Mrs. Foucher were reopened, and Arthur Denis appointed Dative Testamentary Executor in both successions. (Record, pages 42, 49, 50.)

This having been done, Mr. Denis filed a claim or memorial in the proceedings entitled "Arthur Denis, Dative Testamentary Executor, etc., *v.* The United States," No. 603 of the cases before said Commission. In this claim or memorial Mr. Denis appeared as executor, and joined as co-petitioners with himself all of the parties interested in the succession of Mr. and Mrs. Foucher—all citizens of the United States, except the plaintiffs in error, both citizens of France (Record, page 42)—filing a power of attorney, showing that he appeared as the agent and attorney in fact of Paul Louis Burthe and Dominique François Burthe, the plaintiffs in error herein (Admission, 3; Record, page 12); and, subsequently, these plaintiffs in error filed, in

the same proceedings, a separate and distinct petition or memorial, in which they appeared in person. (Admission, 4; Record, page 12; Document C, page 22) The plaintiffs in error are heirs each for one-eighth of the estate of Madam Foucher, the two together being entitled to one-fourth.

In June, 1883, the Commission rendered an award as follows:

"ARTHUR DENIS
v.
"THE UNITED STATES. } *No.* 603.

"We allow this claim at the sum of nine thousand two hundred dollars, with interest at five per cent. from April 1, 1865." (Exhibit E, Record, page 14.)

This amount is about one-fourth of the sum recommended by General Canby to be paid, and it may be noted just here that, although in all of the documents previously filed in the proceedings, the case in question is entitled "Arthur Denis, Dative Testamentary Executor, etc., *v.* The United States," yet, in the award, it is entitled "Arthur Denis *v.* The United States." In other words, there is nothing in the award which shows whether it is in favor of Arthur Denis, executor, or Arthur Denis, agent. He had appeared in both capacities.

Under this award Mr. Denis collected $8,229.18, from which sum he reserves $114.98 for future costs, and deducts $2,834.20 for charges and expenses, which all parties concede should be paid as proposed by him, leaving a balance of $5,280, which he proposes to distribute among the legatees of Madame Foucher. (See Tableau of Distribution, Record, page 4.)

The parties named in the proposed tableau of distribution are the heirs and legatees of Mrs. Foucher, and are the same persons that had received the assets previously distributed, except that some of the parties receiving under the previous distributions having died, their heirs are named in their places. (Record, page 9.)

The assets previously distributed were derived, not under any award or judgment of any claims commission, but from the usual and ordinary administration of the estates of the de-

ceased, by sale of property left by them and under their control at the time of death. (Record, page 9.)

Of the parties named in the proposed tableau of distribution all are and have always been citizens of the United States of America, except two, Paul Louis Burthe and Dominique François Burthe, the plaintiffs in error, both of whom are and always have been French citizens. (Admission 6, Record, page 13.)

Upon the tableau the Executor makes the following statement as a part thereof: "The undersigned Testamentary Executor understands that the French and American Claims Commission established the uniform jurisprudence for its decisions that it could not hear and determine any claims against the United States except those of claimants and beneficiaries who were French citizens, and that the said Commission rejected all claims of persons not French citizens, even when they represented the claim of a deceased French person. In claim No. 603 of the Succession of L. F. Foucher de Circé the actual claimants are all American citizens except Paul Louis Burthe and Dominique François Burthe, who are French citizens. Under the said jurisprudence of the Commission, and considering the status of the American claimants, the Executor felt great doubt and hesitation as to the distribution to be made under this tableau. On the one hand it seemed as if the Commission under its rulings could not have made any award in favor of the American claimants, and that the award as allowed must have been intended for the French claimants only; but, on the other side, the Commission not having in express terms excluded the American claimants, the Executor concluded, in making the tableau, to allow the several legatees their recognized proportions of interest in the estates, leaving the French heirs to come by oppositions and assert their rights, if any they have, to the entire award." (Record, page 5.)

To this tableau the plaintiffs in error filed an opposition, referring specifically to the treaty under which the French and American Claims Commission was established, and setting forth that, under this treaty and under the ruling of the Claims Com-

mission, no allowance would or could be made to the heirs and legatees of any person who was a French citizen at the time he suffered damage, unless such heirs and legatees were themselves French citizens at the time the claim for damage or loss was filed; and that no Executor or Administrator representing the succession of a person who was a French citizen at the time he suffered damage could have any standing before said Commission or receive any award against the United States, except to the extent that he represented, as the beneficiaries under such award, persons who were citizens of France at the time of the filing of said claim; that such was the ruling and jurisprudence of the said Commission, and that such ruling and jurisprudence were in exact accordance with the terms of the treaty; that Mr. and Mrs. Foucher were French citizens at the time that the damage was suffered and at the time of their respective deaths, but that none of the persons mentioned on the tableau of distribution, except the plaintiffs in error, were, when the claim was filed, or are now, citizens of France; that the plaintiffs in error are and have always been citizens of France, and that under the treaty between France and the United States, and under the ruling and jurisprudence of the Commission, no award could be made in the claim No. 603, except in their favor; that they intervened and took part as co-plaintiffs in said proceedings No. 603, and that, without their intervention and presence no award could or would have been made or allowed; that the claim presented by the Executor exceeded $100,000, and the share and proportion of each of the plaintiffs in error in the assets and succession of Mr. and Mrs. Foucher is one undivided eighth; that the award in question was intended and allowed for the plaintiffs in error, and no other persons; that no award was intended, nor could any award have been made, nor was any made on the claim filed by Arthur Denis, except for them, and that they should receive the entire amount. (See Opposition, Record, pages 5 to 8.)

As the case shall be examined, it will amply appear that the amount awarded was really only one-fourth of the damage which the Marquis had suffered, and that the French heirs are en-

titled to one-fourth of the succession, so that the question to be decided is whether the money awarded under the circumstances above set forth is to be divided among the heirs and legatees as if it had been collected by the Executor in the ordinary routine of business, or is to be dealt with as an award by a Commission, which was organized under a treaty which had for its sole object the securing of compensation to French citizens for loss and damage caused by the armies of the United States.

The court of original jurisdiction maintained the opposition of plaintiffs in error, decreeing that the entire fund should go to them. (See Opinion, Record, pages 26 to 29; Judgment, page 29.) From this judgment the Executor appealed to the Supreme Court of Louisiana, which tribunal reversed the decree below, giving judgment in favor of the Executor. (See Opinion, Record, 34; Judgment, page 36.) Associate Justice Fenner dissented from the opinion of the majority of the Court. (See Dissenting Opinion, Record, page 36.)

The judgment of the Supreme Court of Louisiana having become final, plaintiffs in error have brought the case by writ of error to the honorable the Supreme Court of the United States.

II Assignment of Errors.

The errors complained of may be briefly stated as follows:

(A.) The decision of this case is to be governed by the provisions of certain treaties of the United States, and the Supreme Court of Louisiana has erred in ignoring the provisions of these treaties.

(B.) Under the treaties in question, no award could be granted except to French citizens, and the Court has erred in rendering a decree which gives three-fourths of the award to persons not French citizens, and to that extent has nullified and violated the provisions of said treaties.

(C.) Under the treaties in question, between the United States and France, neither country could recover from the other any award except where the actual claimants, by whatever title,—whether by descent, devise, or conveyance,—were at the date of the award citizens of the country recovering, and

at the date of the award of the fund in controversy no person in interest, save the plaintiffs in error, was a citizen of France, and no award was made or could have been made save to them; and the Supreme Court of Louisiana erred in denying the claim of the plaintiffs in error for the whole of said award.

(D.) Under the treaties in question and the rulings of the Claims Commission created thereunder no award could be made to an executor except in so far as he represented French citizens, and the Court has erred in declaring that the award of the fund in controversy was made simply to the legal representative of a deceased person, simply to a Dative Testamentary Executor, whereas, since Arthur Denis appeared in said proceedings both as executor and as agent of plaintiffs in error, the award was made to him as executor impressed with a trust in favor of plaintiffs in error or else to him as agent of plaintiffs in error.

(E.) The Court has erred in declaring that the right which Madame Foucher had to receive under the treaties in question could be given or bequeathed to any person whatsoever, whereas, since these treaties were only in favor of French citizens, any bequest which Madame Foucher might make of her claim to persons not French citizens would be inoperative, null, and void so far as concerned any claim by such persons under said treaties.

(F.) The Supreme Court of Louisiana is in error in basing its adjudication of the rights of the parties herein upon the fact that they are all the legatees of the Marquise Foucher de Circé, and that, as such, they must take under her will, even in the distribution of the fund derived from the Treaty, in the manner and proportions prescribed in said will, the Court creating and declaring, in this respect, between universal legatees or testamentary heirs and heirs-at-law, a difference which does not exist in the premises. The plaintiffs in error are entitled to the award of the Commission because they are testamentary heirs (if they were not heirs at all, legal or testamentary, they would have no rights in the matter); but it is not enough that they should be heirs, they must, also and beside,

be French citizens. In other words, the treaty has coupled the condition of their French citizenship to their quality of heir in awarding the indemnity to them. The position of all the parties before the Court is therefore precisely the same as if they claimed, not under the will, but as heirs-at-law.

(G.) Under the treaties in question, under the interpretations, rulings, and jurisprudence of the Commission created thereby, and under the facts of this case, it is overwhelmingly shown that the total amount awarded belongs to the plaintiffs in error, and the Supreme Court of Louisiana erred in ignoring and disregarding said treaties, interpretations, rulings, jurisprudence, and facts, and in giving three-fourths of said award to parties not entitled thereto.

III. Argument.

In the discussion of the matters now under consideration, the following propositions are respectfully submitted:

(1). *This case is not governed by the laws of Louisiana, but by the treaty under which the award was collected.*

(2). *Under the treaty providing for the French-American Claims Commission, no award could be made against the United States except in favor of persons who were, at the time of the award, citizens of France.*

(3). *The fund should not be dealt with as an ordinary asset of the succession of Madam Foucher, but must be dealt with in the manner and under the conditions prescribed by the treaty under which it was realized.*

(4). *Under the treaty, the rulings of the Commission, and the facts in this case, the total amount*

awarded belongs to the plaintiffs in error, who are the only persons in interest, at the same time citizens of France and heirs of Madam Foucher.

The discussion of the foregoing propositions involves an examination into the several errors assigned above—the first proposition more particularly covering the error designated by the letter A, the second those designated by the letters B, C, D, and E, the third those designated by the letters D, E, and F, and the fourth that designated by the letter G.

---

(1). *This case is governed, not by the laws of Louisiana, but also by the provisions of the treaty itself, which is, in the premises, the supreme law of the land.*

It is so ordained by the Constitution of the United States: "This Constitution and the laws of the "United States, which shall be made in pursuance "thereof, and all treaties made, or which shall be "made, under the authority of the United States, "shall be the supreme law of the land, and the "judges in every State shall be bound thereby, any-"thing in the constitution or laws of any State to "the contrary notwithstanding."

The decisions of this honorable Court have established an unvarying jurisprudence upon this point from the early days of its existence up to the present time.

In Ware *v.* Hylton (3 Dall., 237), the Court said: "It is the declared duty of the State judges to de-

" termine any constitution or laws of any State con-
" trary to that treaty, or any other made under the
" authority of the United States, null and void.
" National or Federal judges are bound by duty and
" oath to the same conduct."

And in Hauenstein *v.* Lynham, 100 U. S., p. 483, quoting Ware *v.* Hylton and later decisions, and reaffirming the doctrine that the treaties of the United States are the supreme law of the land, and that State judges must declare null and void State laws which are contrary to them, the Court held that certain property, which had been decreed by the Supreme Court of Virginia to have escheated to the State under its own laws, must, under the terms of a treaty of the United States with the Swiss Confederation, be surrendered to the party claiming by virtue of the said treaty, because the latter was paramount to the laws of Virginia. See the authorities cited in this case. (Cooley Const. Limit., p. 14.)

Our chief concern, therefore, in this case, is not with the laws of Louisiana, by which succession rights are settled, nor is it with the testamentary dispositions of Mrs. Foucher de Circé. The question is, to whom does the treaty intend that this fund, paid under it by the United States, should go?

It order to solve this question we must first consider what the award of the Commissioners, under the authority of the treaty, has adjudicated, upon what and between whom it is conclusive, and upon what and between whom it is open to the courts for enquiry and judgment.

The jurisprudence of this honorable Court upon this subject has repeatedly declared that the award of the Commissioners settles two facts, and no more. First, the validity of the claim against either government; and, secondly, the amount of the indemnity to be paid.

It settles nothing whatever as to the conflicting rights of the respective claimants, *inter sese.*

The first case on this point is that of Comegys. *v.* Vasse, 1 Peters, 193. It arose under the treaty with Spain, known as the Florida Treaty, which is to be found in vol. 8 of the Statutes-at-Large, p. 260.

That treaty substantially provided for the appointment of three Commissioners, who should receive, examine, and decide upon all claims arising under the treaty, and should be authorized to hear and examine every question relative to said claims, and to receive all suitable testimony concerning the same.

In that case the Court said: "It has been justly "remarked, in the opinion of the learned judge who "decided this cause in the circuit court, that it does "not appear, from the statement of facts, who were "the persons who presented or litigated the claim "before the Board of Commissioners; nor whether "Vasse himself was before the Board; nor who were "the parties to whom or for whose benefit the award "was made. We do not think that the fact is ma-"terial, upon the view which we take of the author-"ity and duties of the Commissioners. The object "of the treaty was to invest the Commissioners with "full power and authority to receive, examine, and

" decide upon the amount and validity of the as-
" serted claim upon Spain for damages and injuries.
" Their decision, within the scope of this authority,
" is conclusive and final. If they pronounce the
" claim valid or invalid, if they ascertain the amount
" their award in the premises is not re-examinable.
" The parties must abide by it as the decree of a
" competent tribunal of exclusive jurisdiction. A
" rejected claim cannot be brought again under re-
" view, in any judicial tribunal; an amount once
" fixed is a final ascertainment of the damages or in-
" jury. This is the obvious purport of the language of
" the treaty. But it does not necessarily or naturally
" follow that this authority, so delegated, includes the
" authority to adjust all conflicting rights of different
" citizens to the fund so awarded. The Commis-
" sioners are to look to the original claim for damages
" and injuries against Spain itself, and it is wholly
" immaterial for this purpose upon whom it may in
" the intermediate time have devolved, or who was the
" original legal, as contradistinguished from the
" equitable owner, *provided he was an American cit-*
" *zen.* If the claim was to be allowed as against
" Spain, the present ownership of it, whether in as-
" signees or personal representatives or *bona fide*
" purchasers, was not necessary to be ascertained in
" order to exercise their functions in the fullest man-
" ner. Nor could they be presumed to possess the
" means of exercising such a broader jurisdiction
" with due justice and effect. They had no author-
" ity to compel parties asserting conflicting interests

" to appear and litigate before them, nor to summon
" witnesses to establish or repeal such interests; and
" under such circumstances it cannot be presumed
" that it was the intention of either Government to
" clothe them with an authority so summary and
" conclusive, with means so little adapted to the at-
" tainment of the ends of a substantial justice. The
" validity and amount of the claim being once ascer-
" tained by their award, the fund might well be per-
" mitted to pass into the hands of any claimant; and
" his own rights, as well as those of all others who
" asserted a title to the fund, be left to the ordinary
" course of judicial proceedings in the established
" courts, where redress could be admitted according
" to the nature and extent of the rights or equities
" of all the parties. We are, therefore, of opinion
" that the award of the Commissioners, in whatever
" form made, presents no bar to the action, if the
" plaintiff is entitled to the money awarded by the
" Commissioners."

In the case of Sheppard *et al. v.* Taylor *et al.* (5 Peters, 675), arising also under the Florida treaty, the Court repeated its ruling on this point, in the following words, viz: "The award of the Commis-
"sioners is conclusive upon this subject (that the
"claim was a valid one against Spain under the
"treaty); but it concludes no more than its own cor-
"rectness."

In the case of Frevall *v.* Bache (14 Peters, 95), arising under the treaty with France, of July 4, 1831 (4 Stat. at Large, p. 574), the Court said: "Two

"questions have been presented for consideration "here:

"1. Is the decision of the Commissioners ap- "pointed under the treaty with France conclusive "upon the rights of the parties?

"2. * * * * * * *

"Upon the first question the Court have enter- "tained no doubt. This case cannot, we think, be "distinguished from the cases of Comegys *v.* Vasse "(1 Pet., 212), and Sheppard and others *v.* Taylor "and others (5 Pet., 710). It has been argued on "the part of the appellee that these cases were de- "cided under the treaty with Spain, and that the "language of that treaty and of the act of Congress "creating the Board of Commissioners under it, dif- "fers materially from the treaty and act of Congress "under consideration, when defining the powers of "the Board. It is true that there is a difference in "the words used, but in our judgment they mean the "same thing. The rules by which the Board is di- "rected to govern itself in deciding the cases that "come before it, and the manner in which it was "constituted and organized, show the purposes for "which it was created. It was established for the "purpose of deciding what claims were entitled to "share in the indemnity promised by the treaty; and "they, of course, awarded the amount to such person "as appeared from the papers before them to be the "rightful claimant. But there is nothing in the "frame of the law establishing this Board, or in the "manner of constituting and organizing it, that

"would lead us to infer that larger powers were in-
"tended to be given than those conferred upon the
"Commissioners under the Spanish treaty. The plea,
"therefore, put in by the defendant in bar of the
"complainant's bill, cannot be sustained, and the
"case is fully open before this Court upon its merits."

And, finally, in the case of Judson *v.* Corcoran (17 How., 612), arising under the treaty with Mexico, the Court said: "In regard to the preliminary ques-
"tions raised at the bar, it may be remarked that we
"have no doubt the district court had authority to
"hear and determine the equities of the parties,
"notwithstanding the judgment in Corcoran's favor
"by the Board of Commissioners. The question
"that an award like the present is not conclusive
"among adverse claimants, was settled in the case of
"Comegys *v.* Vasse (1 Pet., 193), in 1828, and has
"not since been open."

It is demonstrated from the foregoing authorities that four principles have been and remain well established in the jurisprudence of this honorable Court, to wit:

First. That a treaty of the United States is the supreme law of the land, to which all judges in the country, State as well as Federal judges, must yield obedience, and to which State laws must yield precedence.

Secondly. That the award of the Commissioners under such treaties of reciprocal indemnity, to be paid by either country, settles only the validity of the claim and the amount of damage and indemnity, and nothing whatever between conflicting claimants.

Thirdly. That the courts have authority to determine the respective rights of conflicting claimants *inter sese* in and to the award of the Commissioners and that in determining such rights, the courts must consider and apply the provisions of the treaty, and not the municipal laws of the States, if the same are contrary thereto.

Fourthly. That the award of the Commissioners has none of the elements of *res judicata* or former adjudication between the conflicting claimants, and, consequently, that all legal evidence is admissible to establish before the courts the rights of parties entitled to the indemnity fixed by the award of the Commissioners.

The treaty which governs this case is, in respect to the jurisdiction, authority, and award of the Commissioners, similar to the treaties which were the subject of the decisions we have just cited.

---

(2). *Under the treaty providing for the French-American Claims Commission, no award could be made against the United States except in favor of persons who were at the time of the award citizens of France.*

The treaty itself, the rules adopted under its authority by the Commissioners, and the jurisprudence established by them, all show what description of persons were held in view as the contingent beneficiaries of the indemnity.

The treaty under which this case arises is entitled:

"A Convention between the United States of "America and the French Republic, for the settle- "ment of certain claims of the citizens of either "country against the other."

It provides, substantially, that all claims of citizens of the United States upon the Government of France, arising out of acts committed by the French authorities during the late war between France and Mexico, or during the war of 1870–71, between France and Germany, and during the insurrection of the Commune; and, on the other hand, all claims of *citizens of France* upon the Government of the *United States*, arising out of acts committed by the authorities of said United States during the period comprised between 13th April, 1861, and the 20th August, 1866, shall be referred to three Commissioners; and that the said Commissioners shall be competent and obliged to examine and decide upon all claims of the aforesaid character presented to them by citizens of either country. (Articles I and II. Treaties and Conventions between the United States and other Powers, p. 356, *et seq.*)

That the three Commissioners are, impartially and carefully, to examine and decide, to the best of their judgment, and according to public law, justice, and equity, all claims within the description and true meaning of Articles I and II, which shall be laid before them on the part of the Governments of the United States and of France, respectively.

That they shall investigate and decide said claims

upon such evidence or information only as shall be furnished by or on behalf of the respective Governments. (Article IV and V.)

That all sums of money awarded by the Commissioners shall be paid by the one Government to the other, at the Capital of the Government to which they are paid. (Article IX.)

That the high contracting parties agree to consider the awards of the Commissioners as a full, perfect, and final settlement of all claims upon either Government within the description and true meaning of Articles I and II. (Article XI.)

The Act of Congress, June 16, 1880, to carry into effect the provisions of the treaty, provided for the organization of the Commission, for the appointment of an agent on behalf of the United States, and authorized the Commissioner on the part of the United States, in conjunction with the other Commissioners, to make all needful rules and regulations for conducting the business of the Commission. (21 Stat. L., 304.)

It is evident from these provisions of the treaty, as also from provisions contained in the Act of Congress, that France is not intended, in any case, to pay an indemnity to her own citizens for damage caused by the United States; nor the United States to pay any to their own citizens for damage caused by France; nor either country to pay any to its own citizens for damage caused by itself.

Any award of the Commissioners, therefore, or any judgment of court, by which a dollar of the French

money would go to French citizens, or, *vice versa*, a dollar of the American money to American citizens, would be a complete subversion of the purpose and object of the treaty.

This is so clearly the intention, that the treaty provides that the award money must be delivered, not to the successful claimants themselves, but to their respective Government, the French Government, for payment to French citizens, to the United States Government, for payment to American citizens.

Would the French Government consent to receive the money and turn it over to American citizens?

Would the United States consent that money paid by them to indemnify French citizens, should be used to indemnify American citizens?

In the case at bar, the Dative Executor has received the award money from the French Government. He is a trustee of the fund. What is the purpose and condition of the trust? That he should pay it to the French citizens, and to none others?

The award being an indemnity for injury received by the claimant, it follows from what precedes, that the French Government will only pay such indemnity to the American claimant if he were an American citizen, both at the time the injury was received and at the time the indemnity is granted, and, *vice versa*, the United States will only pay the French citizen such indemnity if he were such at both of these times.

The same rule prevails if the claimant is an heir

of the party who suffered the injury. If the claim is against the United States, the award will only be granted if the ancestor was a French citizen when the injury was received, and the claimant a French citizen when the award is granted.

This is exactly what was considered and done in this case. The two opponents to the Tableau of Distribution of the Executor—the plaintiffs in error—being the only two French citizens among the various heirs of the late Foucher De Circé, before the Commissioners, the counsel for the French Republic and the private counsel of the claimants themselves, abandoned in their Brief, the claim of the American heirs and contended only for the rights of these two French heirs.

(See Exhibit D, Record, pages 56 to 59.)

That in this very case the American heirs were excluded as such by the Commissioners, nobody can entertain any doubt after examining the statement of the American Commissioner Aldis (Record, page 14), and the letters of the counsel for the French Republic to the Executor (Record, pages 15 to 17). And it is for that reason that the Commissioners only awarded one-fourth of the damage proved, the two French heirs representing together one-fourth of the estate. (See Exhibit D; Record, pages 56 to 59; also letter of counsel of claimants to executor, Record, page 22). We shall refer more fully to these matters hereafter.

The question as to who should take, came squarely

before the Commissioners in another case before them, that of the estate of L. R. Delrieu, a French citizen who died in New Orleans, where his succession was opened and represented by P. S. Wiltz, public administrator.

The claim was presented by the administrator for account of the creditors and heirs of the deceased.

The Commissioners, in passing upon the claim, said:

"We think it is not enough that the deceased "was a French citizen when he suffered the loss and "when he died, and that his administrator presents "his claim. It should further appear that *the real* "*and beneficial claimants, who will ultimately receive* "*the amount that may be allowed, are French citi-* "*zens*, and they must appear and present their claims. "This appears to us to be the plain meaning of the "first and second articles of the Convention. They "do not, in our judgment, admit of any other con-"struction." (The italics are our own).

In the same manner the Commissioners rejected the claim of Archbishop Perché, who was a native Frenchman and had been a French citizen until the year 1870, when he became, by naturalization, an American citizen.

His claim was rejected on the ground that he had no right under the treaty, not having been a French citizen both at the time he suffered the loss and at the time he presented his claim.

It is, therefore, beyond contestation, that if our Dative Executor had alone presented the claim of

this estate, as Wiltz, the administrator of the estate of Delrieu, presented its claim; or if there had been with the Dative Executor before the Commissioners only the American heirs of Foucher de Circé, the claim would have been rejected, because, in the words of the Commissioners, quoted above: "It should "further appear that the real and beneficial claim- "ants, who will ultimately receive the amount that "may be allowed, are French citizens."

If we accept any other view, then we must admit that the Commissioners have meant that the money of the United States should go to American citizens. The conclusion is inevitable, and it leads to a result in direct violation of the treaty.

---

(3). *The fund should not be dealt with as an ordinary asset of the succession of Madam Foucher, but must be dealt with in the manner and under the conditions prescribed by the treaty, under which it was collected.*

In dealing with the award of the French-American Claims Commission, the Supreme Court of Louisiana considers the sum in the hands of the executor as an ordinary asset of the succession to be distributed among the legatees of Madam Foucher, without reference to the source from which the funds came, and without regard to the circumstances and conditions under which the amount was paid and collected. It is treated as any ordinary collection, and disposed of just as it would be had it not been realized through

a treaty and commission, which alone could make the fund available and which had full control of its disposition. In other words, the Court, declaring that the award has been placed in possession of the executor "as an asset of the succession to be disposed "of in its administration," holds that no distribution can be made except among the legatees named in the will of Madam Foucher and in the proportions fixed by that instrument.

Just here, once for all, let us say that we are not seeking to alter the intention of the will of Madam Foucher, or to increase the share of some of the legatees to the exclusion of others, as intimated by the Louisiana Court. We do not ask an increase of the share of the plaintiffs in error. Our contention is that the United States Government has paid over part of the money due under a treaty, and an award in favor of some of the heirs, leaving the others just where they would have been had there not been the treaty or the award. The French legatees simply get their share presently; the Americans must wait for such action of their Government as will do them justice in the premises. The will of Madam Foucher is not to be altered or affected; the share of the American legatees in the claim, which she inherited from her husband, is not to be tampered with, but is to remain where it would be had no award been made, leaving the legal right to collect the share in abeyance until a change of situation shall allow the exercise of that right.

We submit that it is a grave misapprehension to

believe that the award was simply to the legal representative of the deceased; that the fund was intended to be distributed as an ordinary asset of the succession.

It is to be remembered that the executor proceeded not only in his official capacity, but that there were joined with him, as co-petitioners, all the parties in interest, both American and French, the latter being represented by him under special powers of attorney; and that, subsequently, the French heirs took part as claimants or petitioners directly and in person. This was after the Commission had decided that only French citizens could take, and that the claimants "must appear and present their claims." When the matter was finally submitted for adjudication, there was a claim by Arthur Denis as executor, a claim by Arthur Denis as agent, and a claim by the French legatees in person, the latter being for such part thereof as the Commission might deem right and proper. (Document C; Record, pages 22 to 24).

The evidence shows that in 1865 the Military Claims Commission, at the head of which was Major General Canby, had the Foucher claim under consideration, and that General Canby made a report recommending payment of $36,433. The French legatees are shown to have inherited one-fourth of the estate, and, on behalf of claimants, the demand was practically abandoned, except as to this fourth. (Record, pages 56 to 59).

The claim of memorial was originally entitled, "Arthur Denis, Dative Testamentary Executor, etc.,

"*v.* The United States;" and it appears that all the papers filed in the proceedings were thus entitled up to the award. (Admission 8; Record, page 13.) When the time came for rendering the award, the Commission had before it three claims as set forth above, and all the facts and circumstances which we have stated. In one sense, we may say that there were petitioners and intervenors applying for the same funds. Now, what is the award?

In the first place the title of the case is changed; the words "Dative Testamentary Executor, etc." are dropped; the title is given, "Arthur Denis *v.* "The United States." Does this look as if the Commission were dealing with an executor?

In the second place, the award is totally silent as to any details or particulars, the entire instrument being as follows: "We allow this claim at the sum "of $9,200, with interest at five per cent. from April "1st, 1865."

All this is very vague. Are we not forced to admit that there is doubt enough to warrant an examination of the facts and pleadings before the Commission, and of all facts bearing in any manner upon the subject, in order to ascertain what was meant and intended by the award?

Clearly, the executor was far from certain in his own mind, for upon his tableau he sets forth elaborately the doubts and difficulties under which he labored. We have already quoted the statement made by him, and would ask attention to it in this connection.

Naturally, he felt, as he says, great "doubt and "hesitation." Most likely his counsel (who represents the American heirs) felt that the matter was a perplexing one. The amount was paid to Arthur Denis, who had appeared in the case in a dual capacity. He had to take one position or the other. He was in doubt, and finally resolved his doubts in one direction, as shown in the tableau. He might have resolved these doubts in the other direction. He might have taken the position that he had received the money solely for the French legatees. In this case, perhaps, he would have declined to distribute the assets as a part of the succession, leaving the American legatees to bring an action against him for such part of the award as belonged to them. In such event the fund would have come before the Court, not as a succession fund, but as money collected by Arthur Denis and claimed by different parties.

Now, one of the grounds in the opinion of the Supreme Court of Louisiana is that the fund comes before them as a succession fund, as part of the estate of the deceased being distributed by the executor; in other words, the fact that the testamentary executor resolved his "doubts" in favor of the American heirs is in effect used as an argument in favor of the decision of the question. This fact is merely an accident. Had the executor and his counsel looked at matters the other way, had the accident been reversed, then the whole situation would be changed, and the underlying theory upon which the opinion of the Court is based would entirely disappear from view.

We would have a new situation, which would form the basis for an argument just as strong on the other side of the question.

We can see absolutely no ground for the claim that this fund should be dealt with as an ordinary asset of the succession, but every consideration, whether of law or fact, leads directly to the opposite conclusion.

In its opinion the Supreme Court of Louisiana say: "In the absence of an express, final, and determinate "decree of the Commission as to whom the award was "due, we cannot review the judgment of the Commis- "sion and say that the award was in favor of certain "legatees when the award was in favor of the execu- "tor and the amount paid to him on account of the "succession." The same court, in the same opinion and on the same page, declare that the "validity and "amount of the claim being once ascertained by the "award, the fund might well be permitted to pass into "the hands of any claimant, and his own rights, as well "as those of all others who asserted a title to the fund, "be left to the ordinary course of judicial proceedings "in the established courts, where redress could be ad- "ministered according to the nature and extent of "the rights or equities of all the parties."

If the first quotation means anything it means that the Court cannot give the money to the French heirs, because the Commission did not say it should go to them.

In the second quotation it is unquestionably stated that the Commission need not specially designate the

beneficiaries, because the courts can examine and pass upon the rights of all parties in interest.

We find it impossible to reconcile these *dicta*.

The Supreme Court of Louisiana appears to consider that the case might be different were it not that the plaintiffs in error are legatees under the will of Madam Foucher, the opinion declaring that, since the plaintiffs in error claim under the will, they must be bound by its provisions, and the Court "cannot in-"crease the share of some of the legatees to the ex-"clusion of others." We have already shown that we do not propose to ignore or disregard the will of Madam Foucher, and that all we seek is to have the French legatees get their just share, leaving the American heirs exactly where they would be had no treaty ever been made to secure indemnity to citizens of France.

We submit that the Louisiana court commits a grave error when it bases its decision solely on the fact that all parties in interest are legatees of Madam Foucher, implying that if the parties were claiming as heirs at law, there might be a difference.

Now, the parties in interest are the universal legatees or testamentary heirs of Madam Foucher, and they represent and stand for and in place of the deceased as fully as if they were the legal heirs, having precisely the same rights, duties, obligations, and disabilities. There is absolutely no ground in the Code or in any statute even suggesting the distinction hinted at in the opinion of the Supreme Court of Louisiana.

In order to take the money awarded, the claimant must first be entitled to receive as heir (whether legal or testamentary can make no difference), since no one but an heir of Madam Foucher could take what belonged to her; and he must be a citizen of France since, under the treaty, none but French citizens can receive the amount awarded. In short, the treaty has coupled the condition of French citizenship to the quality of heir, and, since of all those who possess the quality of heirs the plaintiffs in error alone comply with the condition of French citizenship, they must take the amount awarded.

---

(4). *Under the treaty, the rulings of the Commission, and the facts in this case, the total amount awarded belongs to the plaintiffs in error, who are the only persons in interest, at the same time citizens of France and heirs of Madam Foucher.*

To our mind it is perfectly plain that the award was not simply to the "representative of the deceased "French citizen, to his Dative Testamentary Executor," as stated by the Supreme Court of Louisiana, but, assuming that the award was solely to the executor, we submit that this fact alone does not of itself compel a distribution among the legatees of Madam Foucher in the proportions established by her will.

The executor or administrator in such cases is simply the trustee or depositary of a fund or property, which belongs partly or entirely to other parties than the heirs of the estate, and which he must pay or deliver to the true owner or beneficiary.

The cases of Hall *v.* Emerson (13 Peters, 409, 413) and of the succession of Harris (39 Louisiana Annual Reports, page 444) fully sustain us in this proposition; but, to make our meaning clear, let us suppose that some third person had handed the executor the sum of $9,000, to be distributed among the legatees of Madam Foucher, imposing, however, the condition that nothing should go to any person not a French citizen; could there be any doubt as to the course he should pursue? Would it not be his plain, unmistakable duty to divide all that might come in this way among the French legatees?

This is not precisely the case before us, but it shows that there might come to the hands of the executor, for distribution among the legatees, money or funds, in which the Americans could have no share.

Now, in the case at bar, if the Republic of France has appealed to the United States to make good to citizens of France damage done by the armies of the United States, and if the latter under a treaty has agreed to pay only to French citizens such damage as they have suffered, and if the two Governments have created a Commission with power to interpret this treaty, ascertain the amounts due and award payment thereof, and if this Commission, in interpreting the treaty, have decided that nothing can be awarded thereunder except to French citizens, and have decided that the heirs of a French citizen cannot receive anything unless they themselves be French, and if this Commission has awarded the sum of $9,200 under these circum-

stances and conditions, can it be possible for the Court, ignoring the treaty and the Commission, to distribute the money among any but such legatees as may be French citizens? Has not the money come into the hands of the executor impressed with a trust in favor of the French legatees, and must not the legatees, who are citizens of the United States, appeal to their own Government for their proportion of such damage as was suffered from the acts of the United States troops by the person under whom they claim?

We submit that this fund is derived solely under the treaty, without which there would be nothing for distribution, and that, for the purposes of distribution, the treaty is the paramount law. We have shown above the force and dignity which, under the Constitution of the United States and the jurisprudence of this honorable Court, belong and are accorded to treaties of the Federal Government, and it is unnecessary to say anything further in that direction. We assume that it is the purpose of the Court to give effect to the treaty.

We admit "that the claim was a part of the estate " of the Marquise, which she could dispose of as freely " and fully as of any other item of her property," but we deny that this fact entitles the American legatees to any part of the award.

The object of the treaty was to secure payment of claims by citizens of France against the United States, and by citizens of the United States against France. No French citizen could expect, under this

treaty, to collect a claim against France; no Federal citizen could expect to realize a claim against the United States.

Now, while Madam Foucher could bequeath the claim to whom she pleased, yet, if the legatee of the claim were not entitled to receive under the treaty, then, as to him, the treaty and the money collected thereunder, would amount to nothing. He might own his share of the claim, but could get nothing from his ownership until some new turn of affairs should give him a standing in court or before a commission.

The ownership of a claim, and the right to share in a partial collection of that claim, collected under restrictions and conditions, are totally different things. The American legatees doubtless have a right against the United States, but a right against a sovereign carries only such remedies as the latter chooses to give.

The history of the case illustrates well the difference between the right and the remedy. The damage was suffered in 1864, and the right to compensation accrued at once. Five years elapsed and the Marquis died without remedy. The claim passed under his will to his widow, also a French citizen, and, after eight or ten years more, she, too, passed away without remedy, and, we dare say, almost without hope. After nearly twenty years, partial compensation is made; but, in the meantime, death, moving more swiftly than justice, took away forever, from the original sufferers, the privilege of enjoying the tardy recompense.

During all these years the claim existed as a right, but it was merely an abstract right; and it was only with the treaty that even a partial remedy was provided, it was only the treaty which gave practical force and effect to the right, and then subject to the conditions and limitations imposed by the Convention between France and the United States.

Suppose there had been no French legatees. Then, under the ruling of the Commission, the claimants would have had no standing in Court and no award would have been made. In the case of Delrieu the claim was filed by the administrator of a French citizen, none of whose heirs or creditors were French citizens. As quoted above, the Commissioners said:

> "We think it is not enough that the deceased was a French citizen when he suffered the loss and when he died, and that his administrator presents his claim. It should further appear that the real and beneficial claimants, who will ultimately receive the amount that may be allowed, are French citizens; and they must appear and present their claims. This appears to us to be the plain meaning of the first and second articles of the Convention. They do not, in our judgment, admit of any other construction."

The claim was dismissed for want of jurisdiction, though quite likely the American heirs of Delrieu had a valid demand. Under the rulings in the Delrieu case, it is impossible to contend that, if all the legatees of Madam Foucher had been American, any award would have been allowed.

So far from being able to transmit by will to "any person" the right to collect this claim under

the treaty, Madam Foucher herself would have lost her power in that regard, had she ceased to be a French citizen. Archbishop Perché suffered damage while a French citizen, but afterwards he became a citizen of the United States. His claim was filed and was elaborately discussed—the bare report taking more than fifty pages of the Report of Mr. Boutwell. The opinion of the Commission was as follows:

"The Archbishop Perché, in his memorial, states that he was naturalized in the United States in 1870. He does not claim to be a French citizen.

"Without deciding upon any other cases which may be analogous to this, we think that the claim of Monseigneur Perché must be rejected, because it does not come within the terms of the treaty, which only provides for the claims of French citizens.

"While making this decision, we deem it proper for us to express our regret that we cannot take jurisdiction of a case which seems upon its face to be so equitable."

The claim was then disallowed for want of jurisdiction.

Madam Foucher herself, therefore, would have forfeited and lost her standing before the Commission by change of citizenship; how much less, then, was it in her power to delegate to others, not French citizens, the right to prosecute the claim, or to share in the award.

If the Commission dismissed the Delrieu claim because the persons in interest were not French citizens; if it rejected the claim of Archbishop Perché, —"seeming on its face to be so equitable"—because he had ceased to be a French citizen, it is impossible that the same Commission could have allowed the

American heirs to prosecute this claim, or have intended that they should share in the award, without placing itself in an attitude both absurd and inconsistent.

It seems to us, therefore, that while the Louisiana Court is correct in saying, "that the claim was a part "of the estate of the Marquise, which she could dis- "pose of as freely and as fully as of any other item "of her property," nevertheless, the consequences which the Court gives to this fact do not follow legally or logically. Such dispositions as Madam Foucher made to persons not French can be of no force when we are dealing with funds derived under a treaty made exclusively in favor of French citizens.

We suppose there is no question but that all the American heirs are to stand or fall together; we suppose no one will claim that there can be one rule for one of these heirs and a different rule for others. If, then, we show, as to any American legatee, that it is utterly impossible for any portion of the award to have been intended for him, then the same rule must apply to all the American legatees, and the whole sum must go to the French nephews.

Now, it appears that Mr. Louis Burthe, one of the American legatees, "was engaged and took part in " the war of the rebellion against the United States, " and was in the service of the so-called Confederate " States," and this fact was made known to the Commission. (Memorial, Record, page 53). The fact also appears in the evidence in this case. (Admission 7; Record, page 13).

Doubtless this gentleman, in linking his fortunes with those of the Confederacy, followed what he considered the path of duty; but the Government of the United States and the members of the Commission could not regard his course in that light; they could only regard him as a rebel. The treaty was not made for such claims as exist in his favor; it covered only "claims on the part of corporations, "companies, or private individuals, citizens of "France, upon the Government of the United States, "arising out of acts committed against the persons or "property of citizens of France, not in the service "of the enemies of the United States, or voluntarily "giving aid and comfort to the same, by the civil or "military authorities of the Government of the "United States." (Treaty, Article 1).

Can it be admitted for one moment that the Commission, solemnly appointed and selected by two great Governments to carry out this treaty, a Commission which (according to the views of some) did its duty too well to the United States, would have intended to award compensation to a person who was a soldier in the Confederate army, upon whom they were bound to look as a rebel? It seems to us, that to attribute such an intention to the Commission would be to place it in an undignified and ridiculous position, in an attitude directly antagonistic to the sovereignty of one of the high contracting parties.

If, then, we are correct in this point, can there be any doubt as to the claims here made on behalf of the other American heirs? Does not this single ex-

Further, application was made to Mr. A. P. Morse, Assistant Counsel for the French Republic (at that time not employed as counsel in the case now pending), and his statements are very clear. It is his "understanding that the award made by the Commissioners for the sum of $9,200 and interest, was solely on account of the interest of the French claimants and beneficiaries, as it appeared in proof, the counsel of the United States insisting in that and in all other cases that the Commission had no jurisdiction to make awards in favor of claimants who were citizens of the United States, and this was, so far as he was advised, the uniform usage and practice of the Commission." (See Record, pages 15, 16, and 17.) In one of his letters it will be observed that this writer suggests that the proper course of the American legatees is to apply to Congress and the Court of Claims.

To us, in the light of the foregoing, the question under consideration admits of no doubt; but, conceding that there may be doubt, conceding that the interpretations of the treaty given by the Commission in other matters are entitled to no weight in the present instance, conceding that the facts of this case do not show, beyond peradventure, that the fund was intended solely for the French heirs, we submit that the persons best qualified to declare the real meaning and intention of the Commission are the members of that body. The record shows the carefully prepared opinion of at least one of these members. This statement is from the pen of Hon. A. O.

Aldis—one of the Commissioners—a citizen of the United States, who would, naturally, if he had any doubt, favor the legatees residing in his own country. His statement is as follows:

"Of course you understand without my saying it that the Commissioners of the French and American Claims Commission did not assume to make any award distributing among the claimants the amount awarded. They ascertained the facts necessary to give them jurisdiction, viz: whether the claimants were French citizens, and what amount (if any) such French citizens were entitled to. If any of the claimants were not French citizens, then, of course, their shares (if any) were not allowed.

"In this case the counsel for the claimants admitted in their brief that only two of the claimants were French citizens (see p. 58 of the brief), and asked for an allowance only for their shares ($\frac{1}{8}$ each), or one-quarter for both.

"The award, of course, would not allow more than what the claimants by their counsel asked for, nor would the award allow for the shares of parties joined as claimants, but who, it was admitted, on the hearing, were not entitled to any allowance.

"I have no doubt but that we intended to include in our award only the shares of the two claimants, who were French citizens, Paul Louis Burthe and Dominique François Burthe."

We have not sought the opinion of any other Commissioner, not deeming it necessary. Counsel for the American heirs have had nearly four years within which they might have applied to the other members of the Commission, but they have not availed themselves of the opportunity; or, if they have, the answers obtained by them have not been offered in evidence.

We submit that the opinion of Mr. Aldis renders the matter now before the Court free from any possible doubt or question.

We ask the attention of the Court to the grounds upon which Mr. Justice Fenner dissented from the

opinion of the Supreme Court of Louisiana, those grounds being :

" 1st. That the money to be distributed was col-
" lected under a treaty between the United States
" and France ;

" 2d. That under the terms of the treaty, as inter-
" preted by the Commission organized under it,
" neither country could recover from the other any
" award except where the actual claimants, by what-
" ever title, whether by descent, devise, or convey-
" ance, were, at the date of the award, citizens of the
" country recovering ;

" 3d. That, as decided by the Supreme Court of
" the United States, the decision of the Commission
" settles nothing but the amount and validity of the
" claim as between the two nations, and leaves open
" the question as to what parties are actually entitled
" to claim the benefit of the award ;

" 4th. That evidence properly received shows that
" the opponents were the only French citizens in-
" terested in the claim ; that the claim, to the extent
" of the interest of the American co-legatees, was
" substantially abandoned by their own counsel, and
" that the amount awarded was really only that pro-
" portion of the total claim which fell to these op-
" ponents ;

" 5th. That the executor presented the claim and
" received this fund, not as executor simply, but as
" attorney in fact, of all the legatees, including the
" opponents, and is bound to pay it to the parties
" entitled and for whose benefit the award was made,

" who are fully proved to be the opponents herein." (See Record, page 36.)

Suppose the award had been in terms in favor of the French legatees exclusively, what, in that event, would have become of the theory of the Louisiana Court, as to being governed by the will of Madam Foucher, and as to the power of the Court to give the alleged "increased share" to the opponents? Had the award been in favor of the French legatees by name, would not that Court give them the amount? Unquestionably, yes.

Now, we submit that, from the rulings of the Commission in the cases of Delrieu and Perché, and from the facts and circumstances surrounding this case, we have shown beyond the shadow of a doubt that the Commission did not intend any part of the award for the American legatees; that the fund is just as clearly the property of the French legatees as it would have been had their names been inserted in the award.

Do not these rulings and facts show, as clearly as if the French legatees were named in the award, that the Commission meant and intended to give the entire amount to them? But for them there would have been no jurisdiction, and the claim would have been disallowed *in toto*. Let any one read the treaty and the rulings of the Commission, and add the facts that the award is for one-fourth of General Canby's figures, that the French legatees are heirs for one-fourth, that counsel for claimants abandoned before the Commission three-fourths of the claim, that the

American legatees are heirs for three-fourths; and then examine the statement of Commissioner Aldis mentioning the French legatees by name as the sole beneficiaries, and it seems to us that even he who runs must read that the award was intended for the French legatees alone.

It is impossible to examine this case without reaching the conviction that the award was cut down three-fourths because three-fourths of the claim was owned by American citizens. France received the one-fourth due her citizens under the treaty between the two nations, and sent it to an executor in the United States for distribution, in accordance with the provisions of that treaty. It would be a poor return for the comity and confidence shown by France, for a court of the United States to hold back three-quarters of that fourth for its own citizens, for people who did not even have a standing before the Commission.

We cannot admit for an instant that the Courts of the United States will tolerate a scheme which first cuts down the claim because certain of the claimants were American citizens, and then dismembers the reduced award in order to retain three-fourths of it for those identical persons.

Considering all these matters, we remain unshaken in our conviction that the whole of the fund now before the Court belongs to the opponents. It is a hardship upon the American legatees that the three-fourths belonging to them should have been withheld; but, under the terms of the treaty, and the

rulings and interpretations of the Commission, they were without any standing before that body. We can only assume that some day the Government of the United States will recognize and make good what is clearly a just and valid claim in their favor.

This case cannot be settled by the laws of Louisiana alone, nor should we be influenced by our individual opinion as to the equities. The great question is to ascertain what was provided by a treaty of the United States, and what was awarded by the Claims Commission. We are convinced that the Court desires to enforce and carry out that treaty. Under its provisions the Commission was empowered to explain and interpret, and there is not a question here which has not been fully explained and interpreted.

We respectfully submit:

1. That a fund paid under a treaty should be disposed of and distributed in accordance with the provisions of that treaty; that, under the treaty and award, the French legatees have a vested right in the fund now under discussion, and that the distribution proposed to be made of this fund is in direct violation of the terms of the treaty under which the fund was collected, and is a positive divestiture of vested rights;

2. That the award in question was not made simply to the legal representative of the deceased—not to a Dative Testamentary Executor, as declared in the opinion of the Supreme Court of Louisiana, but it was made either directly to Arthur Denis, agent of the plaintiffs in error, or to Arthur Denis, executor, impressed with a trust in favor of the plaintiffs in error; that the award gave the plaintiffs in error a vested right, which will be destroyed and divested if the funds be distributed as proposed;

3. That, while the Marquise de Circé could bequeath any claim or right belonging to her to any one she pleased, as declared by the Supreme Court of Louisiana, yet, when funds collected under a treaty are to be distributed among her legatees, such distribution should accord with the terms of the treaty, and should not be in direct opposition thereto;

4. That opponents do not claim solely under the testament of the deceased, but also under the treaty, and that the latter will be rendered null and of no effect if the judgment already pronounced by the Supreme Court of Louisiana be adhered to.

If we are correct in regard to the foregoing matters, then we submit that the conclusions of the Supreme Court of Louisiana should be revised; that its decree should be reversed, and that the judgment of the Civil District Court for the Parish of Orleans should be affirmed.

Respectfully submitted.

CHARLES CARROLL,
ALEX. PORTER MORSE,
Counsel for Plaintiffs in Error.

1505 Penna. Avenue,
WASHINGTON, D. C., *December*, 1889.

Supreme Court of the United States.

October Term, 1889.

No. 1381.

PAUL LOUIS BURTHE AND DOMINIQUE FRANÇOIS BURTHE, *Plaintiffs in Error,*

v.

ARTHUR DENIS, DATIVE TESTAMENTARY EXECUTOR OF THE SUCCESSIONS OF L. F. FOUCHER DE CIRCÉ AND MRS. L. F. FOUCHER DE CIRCÉ.

In Error to the Supreme Court of the State of Louisiana.

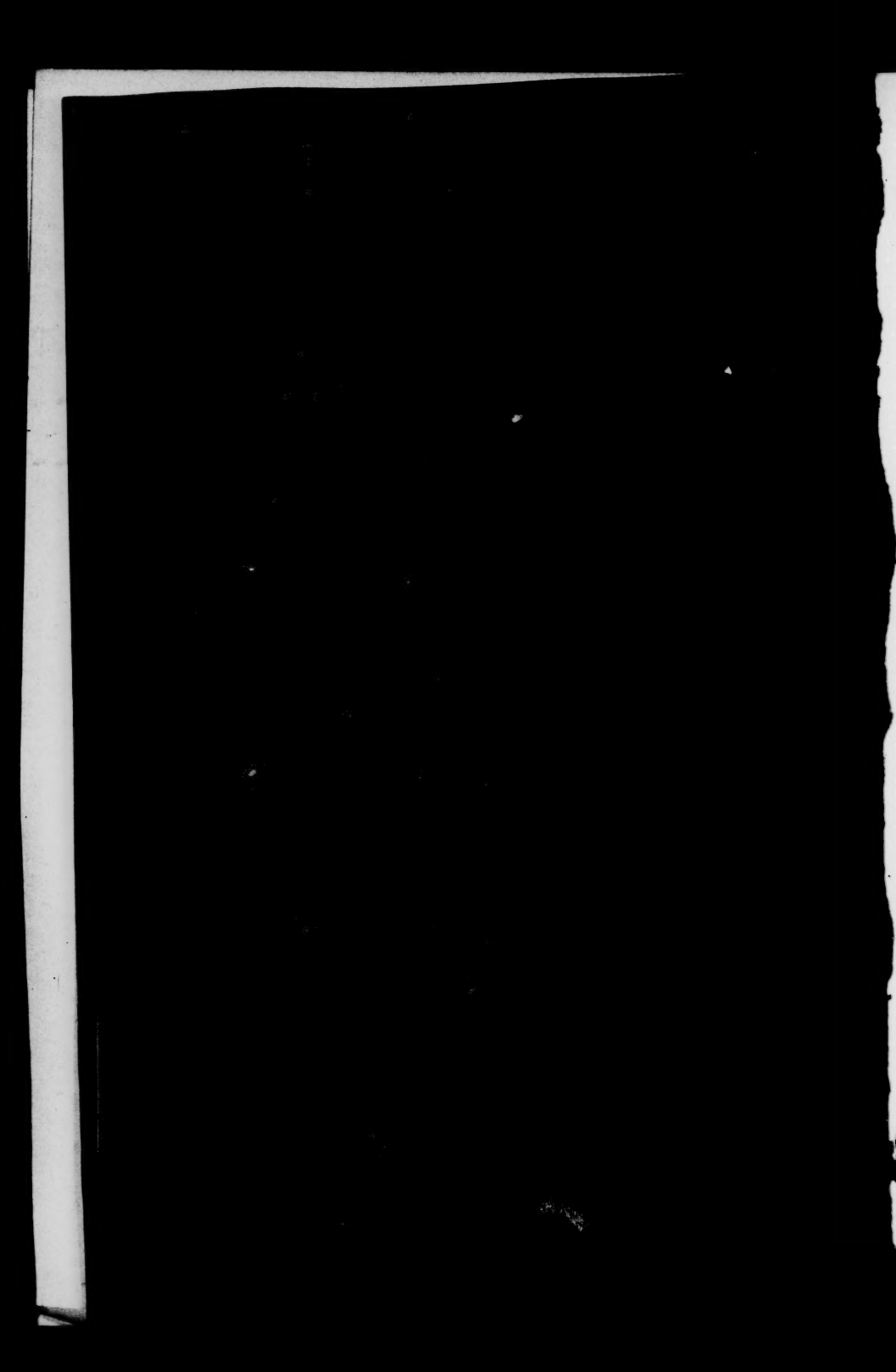
Brief for Plaintiffs in Error, in reply to brief on behalf of Defendants in Error.

SUBMITTED UNDER THE TWENTIETH RULE.

ALEX. PORTER MORSE,
of Counsel for Plaintiffs in Error,

1505 Penna. Avenue,
Washington, D. C., January, 1890.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.



Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1381.

PAUL LOUIS BURTHE AND DOMINIQUE FRANÇOIS BURTHE, PLAINTIFFS IN ERROR,

v.

ARTHUR DENIS, DATIVE TESTAMENTARY EXECUTOR OF THE SUCCESSIONS OF L. F. FOUCHER DE CIRCÉ AND MRS. L. F. FOUCHER DE CIRCÉ.

In Error to the Supreme Court of the State of Louisiana.

Brief for Plaintiffs in Error, in Reply to Brief on behalf of Defendants in Error.

The late hour at which the brief for the defendants in error was received will prevent an extended discussion of its contents.

The amicable nature of the suit requires only the main questions to be considered.

The contention on behalf of defendants in error is—

1st. That this Court is without jurisdiction; and—

2d. That the award made by the Mixed Commission, authorized and organized under provisions of the Treaty[1] and the act of Congress,[2] was made in favor of the executor of the successions of Foucher de Circé, and for distribution, *pro rata*, among all the heirs of said succession, irrespective of citizenship or national character.

I.

A.—*As to Jurisdiction.*

The main reliance on this point is the decision of this Court, Dec. term, 1851, in the case of Williams, trustee, *v.* Olliver *et al.*,[3] following and referring to *Gill, trustee*, v. *Olliver's* executors *et al.*[4]

In these cases, brought here under section 25 of the Judiciary Act of 1789, the competing and conflicting litigants were executors or trustees, claiming title and right to possession of certain certificates of an award made to a common principal by the Commission created under the Treaty between the United States and Mexico of 1839.[5]

---

[1] Convention between United States and the French Republic, Jan'y 15, 1880. Treaties and Conventions between United States and other Powers, p. 356, *et seq.*, edition 1889.

[2] Act of Congress, June 16, 1880, 21 Stat. L., 296.

[3] 12 Howard, p. 111.

[4] 11 Howard, 529.

[5] Treaties and conventions between the U. S. and other Powers, p. 676 *et seq.*

The question before the State courts, both in the first instance and on appeal was, which of the representatives of the common principal had the better right and title.

This was a question which was to be resolved by reference to the laws of Maryland.

The solution of that question was not dependent upon nor did it involve any construction of treaty provisions or an act of Congress.

This fact appears from a review of the principal case, and it is particularly set forth in the opinion of the Court by Mr. Justice Grier.[1]

The Court of Appeals of Maryland having decided this question in favor of one of the contesting claimants on grounds stated, the unsuccessful claimant sued out a writ of error under the 25th section of the Judiciary Act.

When the cause came before this Court, jurisdiction was denied and the writ of error, by the preponderance of a single justice, dismissed.

"Both parties claim certain moneys in Court as assignees of Lyde Goodwin, who was a member of the 'Baltimore Mexican Company,' and entitled to a certain proportion of the money awarded to said company, as a just claim on the Mexican Government. The validity of the award, or the treaty under which it was made is not called in question by either party, as both claim under them. In order to ascertain the effect of certain previous assignments made by Lyde Goodwin, the history of the origin of his claim necessarily makes a part of the case.

"The Treaty and award are introduced as a part of this history, as facts not disputed by either party. The money being in Court, both the Treaty

[1] We have sought in vain through the record of this case to find any question raised directly by the pleadings or "by clear and necessary intendment therefrom," touching the validity of any treaty, statute, or authority exercised under the United States.

and award were *functi officio*, and no decision of the rights of the claimants *inter se* can, in the nature of the case, involve the validity of either."[1]

In the cases relied on by counsel for defendants in error when denying the jurisdiction of this Court, the contesting litigants were claiming contradictorily through a common principal; and the question for determination was, which of the contesting litigants had the better title. The claim of each was for the exclusive control of the certificate or fund growing out of it.

The contest for the possession of the certificate did not arise until after the award was rendered and satisfied. And neither of the contesting litigants in the cases referred to were before the Commission.

In the cause before the Mixed Commission authorized and organized by the Treaty of January 15, 1880, between the United States and the French Republic, the situation was wholly different. In the latter case all the several claimants, citizens of the United States, as well as citizens of the French Republic, who asserted an interest in the claim of Foucher de Circé against the United States, were before the Mixed Commission. And the citizens of the United States continued before the Commission up to the time of the abandonment of their claims by the private counsel and the counsel for the French Republic. There-

[1] Gill *v.* Oliver *et al.*, 11 Howard, 545.

after, and at the time of the award rendered, only the French heirs (plaintiffs in error here) were before the Mixed Commission, in *propriis personæ*, or by Arthur Denis, their specially appointed agent and attorney in fact.[1]

Whether the title of the contesting litigants in the cases under consideration in 1850 and 1851, resulted from the act of the parties, or by operation of the State law, was a question to be determined by the laws of Maryland.

There could, hence, be no question before the Court of Appeals of Maryland involving the construction or validity of a treaty.

It is submitted therefore that the cause now before this Court, under provisions of the act of Congress, February 14, 1867,[2] can be readily distinguished from Gill *v.* Olliver and Williams *v.* Olliver.

It seems clear from the Record that the claim, right, and title of the French heirs (plaintiffs in error) in and to the whole fund awarded by the Commissioners as their one-fourth interest in the succession of their ancestor, Foucher de Circé, was based upon

[1] Record, pp. 59, 22, 23, 24.

[2] Rev. Stats. U. S., p. 133, Sec. 709.

the Treaty, the Act of Congress, and the rules and jurisprudence of the Commission. It is equally clear that this claim, right, and title has been denied by the Supreme Court of Louisiana.[1] The cause is, therefore, within the jurisdiction of this Court for determination on its merits. It is to be observed in this connection that there is a difference of phraseology in the appropriate and corresponding clauses, Sec. 25 of the Judiciary Act, 1789, and of Sec. 2, act Feb. 14, 1867, which has extended the jurisdiction of this Court.[2]

---

[1] Comparison of other portions of the record with the statement of the facts as set forth in the opinion of a majority of the Supreme Court of Louisiana, discloses the fact that the latter is inexact and misleading. The exposition of the substantive facts which appears in the opinion of King, Justice of the civil district court, and of Mr. Justice Fenner, in his dissenting opinion, is sufficiently full, clear, and accurate.

[2] "* * * where is drawn in question the construction of any clause of the Constitution or of a treaty, statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under (such clause of the said) Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States."

"* * * or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute commission (or authority), may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."

---

[1] Record, pp. 26–29; 34–37.

It is not perceived how the argument on behalf of defendants in error, on the point of jurisdiction, is aided by the citation of *Bethel* v. *Demaret.*[1] In that case it was sought to maintain the jurisdiction of the Court by reference to the 25th section of the Judiciary Act of 1789. The Court, by Mr. Justice Nelson, said, "There was no Federal question presented by the plaintiff in error, so far as appears from the record." * * * "As no Federal question appears in the record, the motion to dismiss must be granted."

In the case now under consideration, plaintiffs in error have relied, in support of their right and title, upon treaty provisions. And the judgment of the Supreme Court of Louisiana has decided the case adversely to this right and title, and with reference to the treaty.

There is a marked difference in the language of the two treaties in respect to the requirement of citizenship or national character[2] as the foundation of jurisdiction. And there is a corresponding difference in the character of the Commissions organized under provisions of these treaties, as well as in the extent and character of jurisdiction granted. The Commission organized in 1839 was unilateral; the Com-

[1] 10 Wall., 537.

[2] Convention between United States and Mexico, April 11, 1839; Convention between United States and French Republic, January 15, 1880. ("Treaties and Conventions between United States and other Powers," edition of 1889, p. 676, *et seq.*, and p. 356, *et seq.*)

mission of 1880 was joint or mixed. The grant of jurisdiction to the former on the ground of citizenship was general; whereas the treaty grant of jurisdiction to the latter—in the matter of the citizenship of claimants on behalf of whom the respective Governments submitted individual claims—was precise, specific, and limited. It is to be observed that a similar distinction exists between the treaty grant of jurisdiction to the Commission which was organized under the Convention between the United States and Spain, 22d May, 1819, and that the controversy in the case of *Comegys* v. *Vasse* arose over a fund awarded by that Commission. The decisions of this Court in *Comeigys* v. *Vasse* and cognate cases, have been reached in causes adjudicated by unilateral or mixed Commissions, exercising jurisdiction under similar treaty provisions. And it is in respect to such causes that the objection to the jurisdiction of this Court, relied on by counsel for defendant in error, has been sustained in a line of familiar cases.

As our opening brief has considered the question of jurisdiction at length, we refrain from any further discussion under this ~~division~~ subdivision.

The mere fact that an individual who happens to be executor, under the laws of Louisiana, is in temporary possession of a fund which,—having resulted from a treaty and an act of Congress, is now in controversy between alien and citizen claimants,—does not, it would seem, ~~whether~~ wrongfully or ~~illegally~~ unlawfully acquired, subject it to the exclusive jurisdiction of the

State tribunals so as to oust the jurisdiction of the Federal courts[1] in a proper case.

B.—*Citizenship and Loyalty or Neutrality Jurisdictional Facts under the Treaty of January* 15, 1880.

The citizenship or national character of claimants was, by the express language of the Treaty, as well as by the requirements of the Rules of the Commission, constituted a jurisdictional fact. And, by the decisions of the Mixed Commission—made after extended argument for and against—this requirement of proof of the appropriate citizenship or national character of actual as well as of original claimants was enforced and required in respect of the successive claimants, whether original, actual, derivative, or beneficiary.[2] And it was applied to the existing as well as to the original citizenship of claimants. And a further provision of the Treaty and the Rules required proof of loyalty or neutrality, as a jurisdictional fact.[3]

The exercise by the Commission of the jurisdiction conferred upon it by the treaty cannot be questioned or assailed on the ground that the judgment pronounced by the Commission is different from such as might have been rendered by the courts of Louisiana or by this Court.

---

[1] The Rio Grande R.R. Co. *v.* Vinet, Oct. Term, 1889.
[2] Wiltz, adm'r of Delrieu, *v.* U. S.; Perché *v.* U. S.
[3] Treaty, Article 1, Rules II and VIII.

The vice in the argument of counsel for defendants in error lies in the assumption that the Mixed Commission accepted jurisdiction of the entire Foucher de Circé claim against the United States, and that the award, which was rendered, was intended in full compensation in respect of the entire claim, in its original, in an amount sufficient to compensate fully the original claimant or all his legal representatives. It seems to counsel for plaintiffs in error that this assumption is directly negatived by express language to be found in the record.

It has already been pointed out that the citizen, under this Treaty, could not establish a claim against the country to which he belonged.

II.

AS TO BILLS OF EXCEPTIONS.

In respect to objections raised in the court of first instance (the Civil District Court, Division "B"), to the introduction in evidence of certain communications and briefs and letters, the attention of the Court is invited to what appears in this connection in the opening brief for plaintiffs in error.[1]

[1] Pp. 38, 39.

III.

As to the Merits.

In this cause it appears that the defendant in error has been and is in doubt as to the character or title by which he holds this fund, or as to what was the intention of the Commissioners who made the award, or whether it is so impressed with a trust in favor of certain beneficiaries that it cannot and ought not to be diverted from them. By the terms of the Treaty

Citizenship was a Jurisdictional Fact,

and the rules of the Commission were carefully and cautiously framed, so that the requirement of proof of citizenship or national character should not be defeated or evaded.[1]

Counsel for defendants in error finds no embarrassment or vagueness in the language of the Commissioners, and reads it to be an award in satisfaction of the entire Foucher de Circé claim, and for the benefit and account of all the heirs and legatees, irrespective of citizenship or national character.

Mr. Aldis, Commissioner on behalf of the United States, who appears to have subscribed the award, entertains a different view, and expresses the opinion that the award of the Commission embraced only

[1] Rules, see Appendix.

the shares of the two claimants who were French citizens.[1]

The discussion has taken a wide range, but the substantive facts on the issues which are relevant and controlling are in a small compass. Two principal questions occur:

First. Did the Mixed Commission, after full examination, finally dispose and adjudicate the entire claim which Foucher de Circé or his estate have against the U. S., irrespective of the citizenship or national character of the heirs and legatees of the succession?

Secondly. Did the Commission, after examination of all the facts in the case and consideration of this jurisdiction as limited to the French citizenship of some of the heirs, adjudicate only that portion of the claim which was represented by citizens of France?

It seems to us that the record sufficiently establishes that the correct answer to the first inquiry must be in the negative, and that the correct answer to the second inquiry is in the affirmative, and these answers resolve both questions to the advantage of plaintiffs in error.

---

[1] Record, p. 14.

The point at issue is, whether the proceeds of the award made to Arthur Denis, were compensation and satisfaction of the entire claim of Foucher de Circé against the United States, and as such assets in the hands of the executor for all the heirs of Foucher, or whether they embrace only that portion of the claim of Foucher de Circé represented by the French heirs (plaintiffs in error), before the Commission and by the same adjudicated.

The scope and effect of the decision in *Comegys* v. *Vasse*[1] is misconceived by counsel for defendants in error. What has been said in this brief in respect to the cases of *Gill* v. *Oliver* and *Williams* v. *Oliver*, applies generally to Comegys *v.* Vasse. In that, as in a line of cases which follows, the controversy was by competing litigants claiming, by a derivative title, through a common principal, in whose behalf an award had been made by a Mixed Commission. And as to such a conflict, of course, the award settled nothing. If the Commissioners, under the treaty of January 15, 1880, had made an award in an amount which represented, and was on account of the entire Foucher de Circé claim against the United States, there would be substantive ground for the demand of the American heirs for a division of the award, and the rule laid down in *Comegys* v. *Vasse* would apply. But there is no analogy in the facts of these cases.

---

[1] 1 Peters, 193.

We have said that Arthur Denis is in doubt in respect to the character or title by which he holds this fund. The fact is, as the rulings of the Commission became known—he was compelled, out of abundant caution, to assume Protean shapes.

He appears—first, in the memorial, as "Arthur Denis, dative testamentary executor of the successions of Foucher de Circé"; secondly, in an amended memorial, as "Arthur Denis, agent and attorney in fact of Paul Louis Burthe and Dominique François Burthe"; thirdly, in the award, as plain "Arthur Denis," without prefix or suffix.

Now, the contention on behalf of defendants in error is, that the award made to *Arthur Denis, simpliciter*, and without more, was a mere accidental or clerical omission; and that the intention was to make an award in the sum named on account of the entire claim of Foucher de Circé. The answer of plaintiffs in error is, that only that portion of the de Circé claim which was represented by the French heirs, was as a matter of fact prosecuted to a finality by the attorney of the French heirs, and by the counsel on behalf of the United States; and that the interests represented by the American heirs was abandoned immediately upon disclosure of their American citizenship.[1] A further answer is that Arthur Denis did not receive,

[1] Record, pp. 18, 19, 56, 59.

and does not hold, the fund presently in controversy, as executor of the succession of Foucher, but as agent and attorney in fact or trustee of the French heirs.

If the award of the Mixed Commission is to be taken as it stands, and apart from the record before the Commission, the legal title to the whole fund is in Arthur Denis. But it is to be observed that the individual in whose name the award is rendered disclaims any interest in the proceeds which are presently in his custody. He appears as a stakeholder, or trustee, and very properly comes into Court to ascertain what distribution shall be made of these proceeds.

If it appear from the Record, as we are satisfied it does, that the Mixed Commission took jurisdiction of and adjudicated, as between the United States and the French Republic, only the one-fourth part of the Foucher de Circé claim against the United States, it is not believed that a different conclusion will be imputed to the Mixed Commission, as the result of the use of language which, if standing, alone and unexplained, might be deemed indeterminate and infelicitous. Standing alone, or separated from the Record before the Mixed Commission, the language of the award

is vague and indeterminate. But viewed in the light of that Record, it is clear that the intention and purpose of the Commissioners was to limit and confine the award to the interest and portion of the French heirs, to the exclusion of the interest and portion of the American heirs. And if there is error in their exclusion of the American heirs, it is not perceived how the Supreme Court of Louisiana, or even this Court, can review or correct such error.

IV.

As to Res Adjudicata.

The award of the Mixed Commission is *res adjudicata* only as to the one-fourth of the Foucher de Circé claim against the United States, which was represented by citizens of France, plaintiffs in error, who were regularly before the Commission. Of these individuals and of the subject-matter represented by them, the Commission properly entertained jurisdiction. The three-fourths of the Foucher de Circé claim against the United States, the title to which was then and is now in citizens of the United States, remain untouched and unadjudicated by the Mixed Commission. It seems clear that the American heirs of Foucher de Circé have an existing claim upon the United States for their three-fourths' interest in the estate of Foucher de Circé, which may be prosecuted, either before the Congress of the U. S., or in the U. S. Court of Claims, under appropriate legislation.

The defendants in error (the American heirs) would seem to be estopped from a further pursuit of the fund in the hands of Arthur Denis by the acts and admissions of their attorney and of counsel on behalf of the United States, who abandoned the prosecution of so much of the claim as was represented by them. It is in respect to this feature of the case that the doctrine of estoppel may be applied. And the failure of the Commission to entertain jurisdiction of that portion of the succession of Foucher de Circé, which was in the American heirs, was tantamount to a dismissal of the said claims for want of jurisdiction.

IN CONCLUSION.

Finally it is submitted that examination of the record leads inevitably to the following conclusions: 1st, That in 1865 the entire Foucher de Circé claim was submitted to the Military Claims Commission, at the head of which was Major-Gen. Candy, and that said Commission made a report recommending payment by the U. S. of $36,433,[1] but that claim was never paid; 2nd, That in 1880, the entire Foucher de Circé claim against the U. S. was submitted to the French and American Claims Commission by the executor of the succession, and when it was disclosed that three-fourths of the claim was at that time represented by American heirs, the de-

[1] Record, pp. 56 to 59.

mand on behalf of the said American heirs was abandoned by their attorney and counsel, and was excluded from consideration by the Commissioners for want of jurisdiction; 3d, That the Commissioners only entertained jurisdiction and made an award against the United States on account of one-fourth of the claim which was at the date of the award represented by the two French citizen heirs, plaintiffs in error.[1]

In view of the records before the Mixed Commission and this Court, it is scarcely necessary to insist further that the claim, right, and title of the French citizen heirs in and to the whole fund awarded by the Mixed Commission was based upon the Treaty provisions of January 15, 1880, of the act of Congress, June 16, 1880, and of the Rules of the Commission.

It is submitted that the conclusions of the Supreme Couurt of Louisiana should be revised; that its decree should be reversed, and that the judgment of the civil District Court for the Parish of Orleans be affirmed.

Respectfully submitted.

ALEX. PORTER MORSE,
of Counsel for Plaintiffs in Error.

1505 Penna. Ave.,
WASHINGTON, D. C., *Jan.* 6, 1890.

---

[1] Record, pp. 14–15 to 17, 56 to 59, 22.

NOTE.—In view of the fact that the several volumes of records of the cases adjudicated by the French and American Claims Commission under the Convention between the United States and the French Republic of January 15, 1880, are not, as counsel believes, readily accessible or to be found in the law library, the several volumes containing the records in the cases of *Arthur Denis, executor, &c.*, v. *U. S.*, and of *Wiltz, administrator of Delrieu*, v. *U. S.*, and of *Perché* v. *U. S.*, as also the final report of the agent and counsel on behalf of the United States, have been placed in the hands of the clerk of the Court for submission with the briefs for the convenient use of the Court.

APPENDIX.

Convention between the United States of America and the French Republic for the settlement of certain claims of the citizens of either country against the other, January 15, 1880.

ARTICLE I.

All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of France, arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of France, or voluntarily giving aid and comfort to the same, by the French civil or military authorities, upon the high seas or within the territory of France, its colonies and dependencies, during the late war between France and Mexico, or during the war of 1870–'71 between France and Germany and the subsequent civil disturbances, known as the "Insurrection of the Commune;" and on the other hand, all claims on the part of corporations, companies, or private individuals, citizens of France, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of France not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same, by the civil or military authorities of the Government of the United States, upon the high seas or within the territorial jurisdiction of the United States, during the period comprised between the thirteenth day of April, eighteen hundred and sixty-one, and the twentieth day of August, eighteen hundred and sixty-six, shall be referred to three Commissioners, one of whom shall be named by the President of the United States, and one by the French Government, and the third by His Majesty the Emperor of Brazil.

ARTICLE II.

The said Commission, thus constituted, shall be competent and obliged to examine and decide upon all claims of the aforesaid character, presented to them by the citizens of either country, except such as have been already diplomatically, judicially, or otherwise by competent authorities, heretofore disposed of by either government; but no claim or item of damage or injury based upon the emancipation or loss of slaves shall be entertained by the said Commission. (21 Stat. L., p. 673, *et seq.*)

An Act to constitute a Joint Commission for carrying into effect the Convention between the United States and the French Republic for the settlement of certain claims of the citizens of either country against the other, signed at Washington on the fifteenth day of January, eighteen hundred and eighty.

* * * * * * *

SEC. 3. *And be it further enacted*, That the President be, and hereby is, authorized to appoint a suitable person as agent on behalf of the United States to attend the Commissioners, to present and support claims on behalf of this Government, to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

* * * * * * *

SEC. 4. *And be it further enacted*, That the Commissioner on the part of the United States, in conjunction with the other commissioners appointed under the provisions of the said convention, is hereby authorized to make all needful rules and regulations for conducting the business of the Commission; such rules and regulations not contravening the Constitution of the United States, the provisions of this act, or the Convention. (21 Statutes at Large, p. 296, *et seq.*)

Rules of the Commission for the Settlement of Claims under the Convention between the United States of America and the French Republic, of January 15, 1880.

* * * * * * *

In addition to the representation of his claim, and the proofs in support thereof which shall have been presented to his Government, the claimant shall file in the office of the Commission a statement of his claim, in the form of a memorial, addressed to the Commission.

No allowance will be made to any person for any share of, or interest in, a claim unless he appear as claimant and set forth his interest.

If a claimant be dead, his executor or administrator, or the legal representatives of the estate, must appear, unless it be shown that there are no creditors, and the estate is settled.

If there be a widow of the deceased claimant, she must appear as claimant, or her share will not be allowed.

If there be heirs, they must appear, unless they are minors under 21 years of age. Minors must appear by guardian or tutrix.

All persons may be joined as claimants in whom the right to any legal or beneficial relief is alleged to exist, whether jointly, severally, or in the alternative. Any award may be given to such one or more of the claimants as he or they may be entitled to. (Rule I.)

* * * * * * *

Every memorial shall state the full name, residence, and post-office address of the claimant, the place and time of his birth, and, if a French citizen, the place or places of his residence between the 13th April, 1861, and the 20th August, 1866, and, if an American citizen, the place or places of his residence during the war between France and Mexico, the late war between France and Germany, and the "insurrection of the Commune." (Rule II.)

The memorial must state whether the claimant is a French or an American citizen; whether native or naturalized; and if he claim in his own right, when the claim had its origin, and of what country he was then a citizen; if in the right of another, whether such other was a French or an American citizen when the claim had its origin, and where was then, and is now, his domicile. (Rule III.)

* * * * * * *

If the claim be against the United States, the memorial must state that the claimants were not in the service of the enemies of the United States and did not voluntarily give aid or comfort to the same between the 13th of April, 1861, and the 20th of August, 1866. (Rule VIII.)

Supreme Court of the United States

OCTOBER TERM, 1889.

No 1381.

PAUL LOUIS BURTHE AND DOMINIQUE FRANCOIS BURTHE, PLAINTIFFS IN ERROR,

VS.

ARTHUR DENIS, DATIVE TESTAMENTARY EXECUTOR OF THE SUCCESSIONS OF L. F. FOUCHER DE CIRCE AND MRS. L F. FOUCHER DE CIRCE ET ALS.

In Error to the Supreme Court of the State of Louisiana

BRIEF FOR DEFENDANTS IN ERROR.

Submitted under the Twentieth Rule.

HENRY CHIAPELLA,
Counsel for Defendants in Error.

A. W. Hyatt, Printer and Stationer, 73 Camp st., N. O.—48172

Supreme Court of the United States.

OCTOBER TERM, 1889.

No 1381.

PAUL LOUIS BURTHE AND DOMINIQUE FRANCOIS BURTHE, PLAINTIFFS IN ERROR,

VS.

ARTHUR DENIS, DATIVE TESTAMENTARY EXECUTOR OF THE SUCCESSIONS OF L. F. FOUCHER DE CIRCE AND MRS. L. F. FOUCHER DE CIRCE ET ALS.

In Error to the Supreme Court of the State of Louisiana.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Louis Frederick Foucher, Marquis de Circé, and his wife, both citizens of France (record, pages 12. 13), died at their residence, in Paris, France, without issue or forced heirs, the former in 1870, and the latter in 1877. They left property in Louisiana. Under the will of the Marquis de Circé, his widow, as universal legatee, was put in possession of his estate by decree of the late Second District Court for the parish of Orleans (record, page 8).

Under the will of the Widow Foucher, Marquise de Circé, her nephews and nieces were appointed her universal legatees conjointly, by equal portions in each branch, and were put in

possession of the estate by decree of the late Second District Court for the Parish of Orleans, affirmed in April or May, 1879, by the Supreme Court of the State of Louisiana, in the case of Burthe, tutrix, *vs.* Denis, executor (31 La. Annual, page 568).

The estate of the widow Foucher de Circé was accordingly divided and subdivided between her nephews and nieces, grand-nephews and grandnieces, in the following proportions, viz. :

Edmond Burthe, ¼ undivided	4-16
L. André Burthe	1-16
Mrs. Marguerite Burthe, widow R. O. Butler	1-16
Marie Estelle and André Burthe, 1 32 each, jointly	1-16
Marguerite and Antoinette, Maud and Victor, Adèle and Cary Burthe, 1-96 each, jointly	1-16
Delord Burthe	1-16
Louis Burthe	1-16
Louise Burthe, wife of Edmond Burthe	1-16
Felicie Burthe	1-16
Paul Louis Burthe, ⅛	2-16
Dominique François Burthe, ⅛	2-16
Total	16-16

Admissions, record, pages 8, 9.)

On this basis, three provisional accounts and tableaux of distribution of the funds of said succession were filed in the years 1878 and 1879 by the testamentary executor, in course of administration (admissions, record, page 9). And the succession having been finally wound up, the testamentary executor was discharged from his trust. (Record, pages 42, 50, plaintiffs' brief, page 2).

Subsequently, viz.: on January 15, 1880, a convention or treaty was concluded between the United States of America and the French Republic for the settlement of certain claims of the citizens of either country against the other, growing out of acts committed by civil or military authorities during a state of war or insurrection. (Preamble and article I, at page 15, part III. U.

S. Statutes at Large, 1879-80.) Thus were embraced counter claims against either government on the part of citizens of the other, arising on the one hand during the Franco-Mexican and Franco-Prussian wars and the insurrection of the Commune, and on the other hand during the war between the States. A Commission of three members was constituted and established under said treaty, to examine and decide upon all claims of the aforesaid character, with full power to make final and conclusive decisions binding upon the High Contracting Parties. Articles I, II, VI, VII, XI.

The Marquis de Circé (a French citizen residing in Paris), owning property near the city of New Orleans, Louisiana, suffered damage to a large amount by and from the wrongful acts of the military authorities of the United States, between the 13th day of April, 1861, and the 20th day of August, 1866; but before any claim for compensation was made by him, and before any compensation was awarded for such damage, and before the treaty was even negotiated, he departed this life (1870), as well as his wife and universal legatee (1877). The claim was thus vested, by law and under the will of the latter, in her universal legatees conjointly, as part of her estate, as soon as it came into life, by the mere operation of the treaty. (Admissions, record, page 12.)

It then became necessary, in order to prosecute the claim for damages against the United States on behalf of the original sufferer, L. F. Foucher de Circé, that his succession be reopened and be further administered upon, as well as that of his wife and universal legatee; and Arthur Denis was accordingly reappointed dative testamentary executor of both successions (record, pages 42, 50, 51; plaintiffs' brief, page 3). As such dative testamentary executor, Denis presented the said claim for damages, amounting altogether to $112,749 (memorial, record, pages 54-55), to the honorable the French and American Claims Commission, in the right of Louis

Frederick Foucher, Marquis de Circé; and he joined with him as claimants the testamentary heirs of Mrs. Foucher de Circé, deceased, in whom alone then existed the right to the claim and award, as derivative and actual beneficiaries (memorial, record, pages 42, 49–50, 51–52, 53–54. Admissions. record, page 12). At a later period, on the —— day of ——, 1882, an intervention or supplemental memorial or petition was filed in the French and American Claims Commission by Paul Louis Burthe and Dominique François Burthe, the two French legatees of the widow Foucher de Circé (the present opponents and plaintiffs in error), wherein they averred substantially that the original memorial filed in the name of Arthur Denis, as executor, was presented with their knowledge, consent and approbation, and for their benefit and for the benefit of any other of the legatees who might be found entitled to any part of the award, and deeming it prudent to come forward and present their claim themselves, they therefore ratify the presentation of said claim and adopt the statements contained in the memorial; and further swearing to their French citizenship then and at the date of the treaty, and to the fact that they never gave aid and comfort to the enemies of the United States, they prayed "that the amount claimed in the memorial be awarded to them to such extent thereof, or to the extent of the whole thereof, as might to the commission seem right and proper." (Sworn intervention or supplemental memorial, marked document C, at pages 22, 23, 24, Record; also, admissions, Record, page 10.)

Such were the pleadings before the French and American Claims Commission when the award was rendered which is the subject of the present litigation. It is found at page 14 Record, and is in the words and figures following, to-wit:

French and American Claims Commission, 1518 H street, Washington, June 26th, 1883.

Authur Denis
vs.
The United States. } No. 603.

We allow this claim at the sum of nine thousand and two hundred dollars, with interest at 5 per cent. from April 1st, 1865.

(Signed) ARINOS,
(Signed) A. LEFAIVRE,
(Signed) A. O. ALDIS.

The sum awarded having been collected, the dative testamentary executor—though his capacity had been omitted in the caption of the award—conceived that it was his duty to account for said funds, as assets belonging to the succession of the Marquis de Circé. Such, indeed, has been the position taken by him in the original memorial filed. Nothing in the decree indicated that it was not to the executor claiming in the right of the Marquis de Circé that the award was made, but in favor of Mr. Arthur Denis as trustee for unnamed principals and in proportions undetermined. The successions of the Marquis de Circé and wife having been merged into each other and consolidated by order of court (record, pages 1, 2), the dative testamentary executor had only one tableau to file for the distribution of these new assets among all parties in interest. The guide was the will of Mrs. Foucher de Circé, as interpreted by the Supreme Court of Louisiana. (Burthe vs. Denis, 31 La. Annual, page 568). And the proposed distribution was in accordance with the three dispositions of funds already made in said succession. (Tableau, record, pages 3, 4). Due regard for the pretensions and claims of the two French legatees to the whole award, the desire to deal impartially with all parties, the conscientious scruples of a mere stakeholder, caused the testamentary executor in well considered remarks, appended to his tableau of distribution, to invite said French legatees to assert their rights (if any they had) by way of oppositions to said tableau. (Record, page 5.)

Such oppositions were accordingly presented.

In their petition of opposition filed in the Civil District Court on January 9th, 1886, the said Paul Louis Burthe and

Dominique François Burthe represent substantially that they are French citizens, both residing in France, and that all other persons interested in the succession and estate of Mr. and Mrs. L. F. Foucher de Circé are citizens of the United States, meaning the other universal legatees named on the account of the executor. (Record, pages 5 to 8.)

Opponents claim the whole of said net sum of five thousand two hundred and eighty dollars ($5280), one-half to each of them ; and they aver that it belongs wholly and exclusively to them, because said sum was received and collected by the accountant, under the award rendered by the "French and American Claims Commission," an international tribunal, constituted and established under the treaty of January 15, 1880, between the Republic of France and the United States of America with a view of settling, receiving and finally deciding all claims of citizens of one nation against the other government, for acts of civil and military authorities during the war between the states on the one hand, and the Franco-Prussian war and insurrection of the Commune on the other hand.

Opponents further aver that L. F. Foucher de Circé and his wife, both French citizens, the original claimants against the government of the United States, on account of damages to their property in Louisiana by federal troops during the war, having both departed this life before the adoption of the treaty of 1880, opponents alone, and to the exclusion of the American universal legatees, acquired the said claim to indemnity from the government of the United States. That under the fixed ruling and jurisprudence of said "French and American Claims Commission," the *actual* claimants at the time of the *filing* of the claims, as well as the *original* claimant from whom the claim was inherited, had to show their French citizenship in order to recover against the government of the United States. (Record, pages 5 to 8. Italics our own.)

Opponents finally aver that no award could therefore be

made in said suit before said International Commission, except in so far as concerned their interest; that they were joined as co-plaintiffs in said proceedings, and that the award rendered by the tribunal was intended and allowed for them alone. (Record, pages 5 to 8.)

The prayer is for an amendment of the tableau by disallowing the amounts proposed to be distributed among the American universal legatees, and giving the whole fund by halves to themselves. (Record, page 8.)

On these oppositions to the executor's tableau the case was tried on February 7th, 1889, in the Civil District Court for the parish of Orleans (the present probate court of the city of New Orleans).

To the introduction of certain letters explanatory of the award and of parol evidence offered by opponents, and also of the report of the decisions and jurisprudence of said Claims Commission, objections were interposed by counsel for the dative testamentary executor which were overruled by the district judge. To such rulings, bills of exception were reserved (record. pages 10, 11), which will be hereafter considered.

From a judgment maintaining the oppositions and ordering amendments of the tableau, as prayed for by opponents, the dative testamentary executor took a suspensive appeal to the Supreme Court of Louisiana. (Record. pages 30, 31). Mrs. Louise Burthe, individually and as natural tutrix of her minor children, and the other universal legatees of the widow Foucher de Circé (the American heirs), joined in said appeal from a judgment excluding them from all participation in the funds to be distributed, and also prayed for a reversal of the same. (Record, pages 30, 31.)

The case was called for trial in the Supreme Court of Louisiana on April 26th, 1889, and was heard and taken under advisement. (Record, page 33). Final judgment and decree was

rendered by said Supreme Court on May 29th, 1889, in the words and figures following, to-wit:

"It is ordered, adjudged and decreed that the judgment appealed from be avoided and reversed, and the opposition dismissed at appellants' (appellees?) costs, and that the tableaux of distribution be homologated according to the classification therein." * * * (Record, page 36.)

An application for a rehearing having been refused on May 31st, 1889, by the Supreme Court (record, page 37), the opponents, Paul Louis Burthe and Dominique François Burthe, sued out a writ of error to operate as a supersedeas, averring in their petition as follows, viz.: "That on the 31st May, 1889, said honorable court refused to grant a rehearing in said case, and the judgment of said court has now become final. That said final judgment and decree has been rendered by the highest court of the state of Louisiana and by the highest court in which a decision could be had in said state, in regard to the matters pending and at issue in said cause. That in said suit and proceedings there was drawn in question the validity of an authority exercised under the state of Louisiana—the authority to distribute said fund as proposed by said executor—on the ground of its being repugnant to the constitution, treaties and laws of the United States, and especially the treaties hereinafter mentioned, and the decision of said honorable court was in favor of such validity. That your petitioners, opponents as aforesaid, claimed in said suit and proceedings a right, title and privilege under a certain treaty between the republic of France and the United States of America, dated 15th January, 1880, and treaties supplemental thereto, and under the constitution and statutes of the United States, and under the authority of a commission created by and exercising power under the United States, and the decision of said honorable court was against the right, title and privilege specially set up and claimed by your petitioners under said treaties, constitution and statutes. That in said suit and proceedings there was drawn in

question the construction of a clause and provision of the treaties of the United States aforesaid, and the meaning and import of an award made by the commission created by and under said treaties and exercising authority under the United States; and your petitioners, opponents as aforesaid, specially claimed and set up a right, title and privilege under said clause and provision of said treaties and under said award, and the decision of said honorable court was against the right, title and privilege specially claimed and set up as aforesaid." * * * * * * * * *
(Record, pages 63–64.)

On said application for a writ of error, an order was granted by the chief justice of the Supreme Court of Louisiana in the words and figures following, to-wit:

Although I doubt that a writ lies in this case, I allow it, as the Supreme Court of the United States may deem otherwise.

It is ordered that the writ be allowed and issue on the plaintiffs in error giving bond and surety, conditioned as the law directs, for eight thousand dollars.

New Orleans, June 3d, 1889.

E. BERMUDEZ,
Chief Justice of the Supreme Court of the State of Louisiana.

(Record, page 65.)

Assignment of errors was also filed in the Supreme Court of Louisiana, which are fully set forth at pages 67, 68, 69, 70 of the record. The bond being approved and filed, and service of citations having been acknowledged (record, pages 70–72) plaintiffs in error lodged their transcript in this Honorable Court on October 16th 1889.

It is admitted on both sides that L. F. Foucher de Circé and wife were French citizens; that P. L. and D. F. Burthe (plaintiffs in error) are French citizens, and that they were joint universal legatees of Widow Foucher de Circé under her will for one-eighth undivided each; and also that the other joint universal legatees (defendants in error) are all American citizens (record, pages 4, 8, 9, 13). And finally that all these parties are the same who were originally recognized as the joint universal

legatees of Widow Foucher de Circé and put in possession of her estate by decrees of the Louisiana courts, except that Edmond Burthe and Widow Marguerite Butler having died, their minor children are represented by a tutrix and a tutor respectively. (Record, pages 4, 8, 9.)

The tableau of distribution (record, page 4) discloses the names of all the parties now before the court, the last two named being the plaintiffs in error, and all the others being defendants in error, jointly with the dative testamentary executor.

ARGUMENT IN BEHALF OF DEFENDANTS IN ERROR.

I.—*As to Jurisdiction.*

We are confronted at the threshold of this litigation with a question of jurisdiction. No formal and independent motion to dismiss has been made in this case, because the want of jurisdiction *ratione materiæ* can only be ascertained by an examination of the whole case. The motion to dismiss is so intimately connected with the merits, that one cannot well be separated from the other. Such objections, whenever and in whatever form presented, will always be considered by the court.

This Court has already said: "In many cases the question of jurisdiction is so involved with other questions, that the court cannot eliminate it without a careful examination of voluminous records and passing on the merits. When this occurs, the motion will not be granted, but the question of jurisdiction will be heard on the final argument on the merits."

Semple vs. Hagar, 4 Wall. 431.

Proceeding to the consideration of the question of jurisdiction *vel non*, we ask wherein does the record disclose that in the present suit and proceedings is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity? Wherein does it disclose that there is drawn in question the validity

of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties and laws of the United States, and the decision is in favor of such validity? Wherein does it disclose that any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by plaintiffs in error?

1. In answer to the first proposition, we say that the validity of the treaty of January 15th, 1880, is not drawn in question, as the record shows, and the Supreme Court of Louisiana in no way pronounces against its validity.

2. As to the second proposition, it is clear that there is no statute of Louisiana, or authority exercised thereunder, in conflict with the treaty or repugnant thereto; and the decision complained of could not and did not set up the validity of any such statute or authority of the State over and against such treaty. It cannot be seriously contended that the distribution of funds by the executor (see petition for writ of error, record, page 63) is the exercise of such an *authority* as the two judiciary acts of 1789 and 1867 prescribe.

By authority is meant legislative authority, and nothing else.

This court has already said: "The authority exercised under any state is not to be so construed as to apply to decisions made by the state court. The authority conferred by a state on its courts to hear and determine cases is not the kind of authority referred to in the 25th section; otherwise, every judgment of the supreme court of a state would be re-examinable under this section."

Bethel vs. Demaret, 10 Wall. 537.

How much weaker is the case of a mere executor following the provisions of a will, under the interpretation of a court!

3d. We have now reached the third proposition, which deserves more consideration than the two preceding ones. Where in this case is the right, title, privilege or immunity specially set up or claimed by plaintiffs in error and disregarded by the decision of the state court, which can be made the basis for the writ of error? What article of the constitution, or statute of congress, what treaty, what commission held or authority exercised under the United States, can be invoked in connection with any such right, title, privilege or immunity? The constitution and statutes of the United States being clearly out of consideration in this instance, a treaty is pointed out by our opponents—that of January 15th, 1880—and the commission or tribunal created by said treaty and exercising authority under the United States is also triumphantly designated as the source from which sprang the statutory and much needed right, title, privilege or immunity.

If this contention is shown to be unfounded in law and in fact, the edifice so elaborately constructed, lacking a federal question as its main prop, will fall to pieces; and the case will be dismissed for want of jurisdiction.

In regard to the treaty itself, it is impossible to find in its provisions any right, title, privilege or immunity in favor of plaintiffs in error, or of persons occupying similar positions. The preamble speaks of the desire to settle and adjust amicably the "claims made by the citizens of either country against the government of the other growing out of * * * * *"

The first article is as follows, viz.: "All claims on the part of corporations, companies or private individuals, citizens of France, upon the government of the United States arising out of acts committed against the persons or property of citizens of France, not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same * * * * shall be referred to three Commissioners * * * *."

The *original claimant* is evidently meant in these provisions,

and no one else. The damage he suffered in his person or property, at the hands of civil or military authorities of the United States (if a French citizen), between April 13, 1861, and August 20, 1866, is sought to be repaired and indemnified for, provided, however, no aid and comfort to the enemies of the United States, or service in their armies, could be proved against him. This is the only restriction imposed by the treaty itself. Neutrality on the part of the heirs or legatees of such *original claimant* (in case of death anterior to the date of the treaty), and their French citizenship, are not required by the treaty. Not a word in the preamble and twelve articles of the treaty about the contingency of death or bankruptcy of said original claimant!

If under and by virtue of said treaty any right, title, privilege or immunity could possibly arise (admitting it for the sake of argument), who could set up and claim the same within the meaning of section 25 of the judiciary act, but the Marquis de Circé himself? Was not the claim preferred on behalf of his succession? Did not the rules of the Claims Commission prescribe that "if a claimant be dead, his executor or administrator, or the legal representatives of the estate must appear, unless it be shown that there are no creditors, and that the estate is settled." Rule 1, record, page 38.

If the redress and indemnity due to a spoliated French citizen, who had been neutral during the civil war, could after his death be prosecuted by an executor or administrator, on behalf of the estate, of what consequence would be the status, citizenship and neutrality of any or all of his heirs, the actual and derivative claimants?

It was accordingly provided by the rules of the Claims Commission that the memorial should state "whether the claimant is a French or an American citizen; whether native or naturalized; and if he claims in his own right, when the claim had its origin, and of what country he was then a citizen; *if in the*

right of another, whether such other was a French or an American citizen when the claim had its origin, and where was then and is now his domicile." * * * Rule III, record, pages 38, 39. See also rule VIII, record, page 40.

The distinction is thus made between the actual and the original claimants. And the rule only requires the citizenship *of such other* (original) claimant, in whose right the claim is preferred, to be given in the memorial. Why? Because the citizenship of the actual claimant is not an element in the case.

If the rules had required more, it would have created a dangerous interpolation of words and conditions foreign to the treaty, which only dealt with the *original* sufferer and *his* right to an indemnity, and passed over in silence or indifference the unimportant question as to who would be the actual beneficiaries of the award to be rendered.

It is thus clear that neither treaty nor rules require of derivative claimants, who held no claims of their own against the United States, either French citizenship or neutrality during our civil war, for both elements stand on the same footing.

The fallacy of the argument which superadds an inquiry into the status of the derivative claimants to that of the original claimant (as prescribed by treaty and rules) can easily be demonstrated. The treaty was negotiated with a view to settle amicably the claims made by the citizens of either country against the government of the other (preamble); and *all* claims on the part of corporations, companies or private individuals, citizens of France, upon the government of the United States, arising * * * * * * * * * were referred to three commissioners * * * * * * (article I). Said commission was *competent* and *obliged* to examine and *decide upon all claims* presented to them (article II), and were sworn to examine and decide all claims within the description of the preceding articles (article IV). Their decisions to be conclusive and final (article VI), and to be equally binding, final and conclu-

sive upon the High Contracting Parties (article VII). And finally, the High Contracting Parties agreed (article XI) "to consider the result of the proceedings of the commission provided for by the convention as a full, perfect and *final settlement of any and every claim* upon either government, within the description and true meaning of articles I and II; and that every such claim, whether or not the same may have been presented to the notice of, made, preferred or laid before the said commission shall, from and after the conclusion of the proceedings of said Commission, be considered and treated as *finally settled, concluded and barred.*" (Italics our own.)

But under the narrow construction put on the treaty and rules by plaintiffs in error, the object which the two governments had in view of forever settling all international disputes claims and counter-claims is defeated; two large classes of claimants are created, who can have recourse against neither government—the French heirs of an American claimant from France, and the American heirs of a French claimant from the United States. Such hiatus was certainly not in contemplation of the two Nations.

This *reductio ad absurdum* is a sufficient answer to the argument.

Assuming, therefore, that we have demonstrated that derivative claimants were never contemplated by the treaty or rules, how can it be said that they possess any right, title, privilege or immunity of their own, which they can set up and claim under, and the rejection of which will entitle them to the benefit of the twenty-fifth section of the judiciary act?

Is it not evident that the contention of plaintiffs in error, that the whole fund belongs to them, and not to the estate of the Marquis Foucher de Circé, is a matter which can well be left to the tribunals of the state where the criticised distribution is to be made?

A somewhat similar question came up twice before this court in 1850 and 1851 in error to Maryland in the cases of Gill

vs. Oliver (11 Howard, page 529) and Williams vs. Oliver (12 Howard, page 111). The facts were briefly as follows, viz.: Under the treaty of 1839 with Mexico a sum of money was, by the commission established thereunder, awarded to the "Baltimore Mexican Company." One Lyde Goodwin was entitled to a ninth interest in said company. On his insolvency, in 1817, one Gill had been appointed permanent trustee. Subsequently, in 1829, Goodwin assigned and conveyed to one Oliver all his title and interest in the claim of the company on Mexico. After the money had been awarded and deposited in bank, a contest arose as to its ownership between the said Gill, permanent trustee of said Goodwin, and the executors of Oliver, transferree as aforesaid. The latter were successful in the Court of Appeals of Maryland, whereupon the case was brought by writ of error for review, and on dismissing it for want of jurisdiction the court say: "The validity of the award or the treaty under which it was made is not called in question by either party, as both claim under them. * * * * * The treaty and award are introduced as part of this history, as facts not disputed by either party. The money being in court, both the treaty and the award were *functi officio*, and no decision of the rights of the claimants *inter se* can in the nature of the case involve the validity of either." (Gill vs. Oliver, 11 Howard, page 545).

It was further remarked, in the same case:

"We are equally at a loss to discover in this record where or how the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, is drawn in question in this case. As we have already said, both parties claim money in court; and in order to test the value of their respective assignments from Lyde Goodwyn, introduced the history of the claim from its origin. The treaty and award are facts in that history. They were before the court but as facts, and not for construction." Ibid., page 546. Again, the court say: "The award does not undertake to settle

the equities or rights of the different persons claiming to be legal or equitable assignees or transferrees of the interest of the several members of the company. That is left to the tribunals of the state where the members of the company resided and the assignments were made. In deciding this question, the courts of Maryland have put no construction on the treaty or award, asserted by one party to be the true one and denied by the other. It was before them as a fact only and not for the purpose of construction." Ibid., page 548. In conclusion, "the whole case evidently turns on the construction of the laws of Maryland, and on facts connected with the previous history of the claim, which are not disputed, and which are incidental to the treaty and award, but which raise no question either as to their validity or construction." Ibid., page 548.

In the second case (Williams vs. Oliver, 12 Howard, at page 122) a dismissal for want of jurisdiction being also decreed on the same facts, the court say: "The decision of the court below, therefore, not involving the validity of the treaty or award of the commissioners, or lawfulness of character of the fund, but simply the right and title to the respective shares claimed in it, after the fund had been paid over by the government and brought into court for distribution according to the agreement of all concerned, and which distribution depended upon the laws of the state, a majority of the court taking this view of the case held that there was a want of jurisdiction, and dismissed the writ of error" (the above dictum refers to the case of Gill vs. Oliver).

It was further said: "In order to give jurisdiction to this court to revise the judgment of a state court, under the 25th section of the judiciary act, a question must not only exist on the record, actually or by necessary intendment, as mentioned in that section and the decision of the court as there stated, but the decision must be controlling in the disposition of the case; or, in the language of some of the cases on the subject, the judg-

ment of the state court would not have been what it is, if there had not been a misconstruction of some act of congress, or a decision against the validity of the right, title, privilege or exemption set up under it." Ibid., page 124.

Without further discussion, we submit that the want of jurisdiction is apparent on the face of the record.

II.—As to Bills of Exceptions.

At the trial in the court of first instance, parol and documentary evidence being offered to explain and interpret the award of the French and American Claims Commission, objections were interposed by the undersigned counsel for the executor (record, pages 10, 11). Such parol and documentary evidence consisted of letters from A. P. Morse and E. Janin, attorneys in the case before the claims commission, and a letter from Hon. A. O. Aldis, ex-member of said claims commission, and also the brief filed in said case (record, pages 10–11, 14 to 22, 24 to 26 and 56 to 59). There was also an offer in evidence of the report of decisions and jurisprudence of the claims commission on questions of citizenship (record, page 11), which was equally objected to. The latter, under agreement of counsel (record, page 76), was reduced to short extracts (record, pages 60–63) without any waiver of the objections on record.

The grounds of objection were (as to the letters and brief) that the decision of the claims commission "could not be interpreted by testimony given after the decision, or by argument of counsel before the said commission, or by the opinion of attorneys in said case" (record, page 11); and as to the report of decisions of the claims commission, that the judgment rendered in the case "could not be explained by decisions of the same court in other cases" (record, page 11).

The objections being overruled by the district judge and the evidence admitted, two bills of exceptions to such rulings were reserved (record, page 11).

It may be here remarked that under the Code of Practice of Louisiana no formal bill of exceptions is required. It is sufficient, under the statute of 1877, amendatory of article 488 of such code, that a note of the point and ruling be taken down by the reporter or clerk, in presence of counsel, to stand in lieu of a bill. When the case went up to the state supreme court, on our appeal, the question of the admissibility of such parol and documentary evidence was therefore properly in the record for consideration.

In its opinion and final decree reversing the judgment appealed from, the court does not express itself directly as to the admissibility *vel non* of such parol and documentary evidence explanatory of the award. A clue, however, exists that such evidence could not have been considered by them; for the court say: "In the absence of an express, final and determinate decree of the commission as to whom the award was due, we cannot review the judgment of the commissioners and say * * * * * * * * " (reasons for judgment, record, page 35).

Yet, it must be admitted that Mr. Justice Fenner, in his dissenting opinion, indicates a different result; for he says (record, page 36) that "the claim to the extent of the interest of the American co-legatees was substantially abandoned by their own counsel, and that the amount awarded was really only that proportion of the total claim which fell to the opponents." All of which facts could only be ascertained from the letters, brief, report of decisions, etc., etc., contained in the record subject to bills of exceptions.

But a perusal of the opinion of Mr. Justice Watkins, on the rehearing, again points the other way: "The commission made an award in general terms (says his honor), not designating the names of the beneficiaries." (Record, page 37). Hence the court did, after all, disregard the evidence offered to designate the beneficiaries intended by the framers of the award.

Be that as it may, the bills of exception being regularly in

the record, are available on the appeal of our adversaries; and if well taken, the evidence objected to will be rejected.

The exclusion of all such evidence is urged on two grounds, viz.:

First, because the award is free from doubt, ambiguity or uncertainty. "Candles are not to be lighted when the sun shines brightly."

Secondly, because the pleadings, and not the opinions of counsel or explanations by the judge, can alone be resorted to if the award be susceptible of two interpretations.

I. That the decision is in favor of the succession, and for the benefit of all parties in interest is clear. None of the heirs are mentioned, none are excluded. Why did not the Commission say, if such was their intention, that the intervenors alone (the two French claimants) should have the whole or a certain proportion of the award? Will it be argued that the decree is meaningless, because it does not coincide with anterior decisions of the commission on similar questions; or because it disagrees with the views entertained by counsel of their own case? Must not the ambiguity exist in the terms themselves of the decree? And where can any be found here?

II. But admitting, for sake of argument, that the award is uncertain, what better criterion have we of the matter decided by a court than the pleadings of the case themselves? Can a court explain its intention after judgment rendered? Can other courts seek for that intention beyond the judgment itself and the pleadings in the case?

This rule was once well expounded in a Louisiana case. In the succession of Regan the court say: "We think that when a judgment has once been signed by a court, that it should be interpreted by that court (as well as by all others), as foreign writers say, *objectively;* that is, it should be construed with reference to the pleadings and subject matter of the controversy, according to the natural and legal import of the terms, without

reference to any *subsequent* explanation of the court of what was its intention or in its mind at the time the decree was rendered." (12 La. Annual, page 157).

In two other Louisiana cases it was said: "It is only when the terms of a judgment are of doubtful construction that resort may be had to the pleadings, or to the reasoning for judgment adduced by the court in obedience to the constitution." (Avery vs. Police Jury, 15 La. Annual, page 223, syllabus).

And in succession of Durnford: "Where the words of a judgment are ambiguous, it must be construed with reference to the pleadings in the case, and to the jurisdiction of the court by which it was pronounced." (1 La. Annual, page 92, syllabus).

But where is the authority which countenances parol evidence on the part of judge or counsel to explain a judgment? What weight, therefore, have the Morse and Zanin letters, used as their testimony under commission? (Record, pages 15 to 22, 24 to 26). And what weight has the declaration of Judge Aldis, after the Commission has adjourned sine die and he has been relegated to private life, to the effect that the Court "intended to include in its award only the shares of the two claimants who were French citizens"? See Aldis' letter, record, page 14.

In this connection, why should we be criticised (see plaintiffs' brief, page 41) for not applying to the other members of the Commission, for an expression of opinion which we contended was not proper evidence?

As to the brief offered in evidence (record, pages 56 to 59), it is sufficient to remark that the issues raised in the *pleadings*, and not the points made in argument, usually disclose what was the matter in controversy before a court.

Excluding all of the foregoing letters, opinions and briefs, what remains of the case except the treaty and rules, the memorial and supplemental memorial or sworn petition of intervention, and the award itself, short, clear and intelligible?

Exclude also the report of decisions of the Claims Commission (record, pages 60 to 62); for a decision of a court is not matter of evidence, even if it carries with it the principle of "*stare decisis*."

Without such extrinsic evidence, stripped of its coat of mail, bare and defenceless, plaintiffs' case is now hopeless! The award, which is *ours*, cannot be shown to be *theirs*, by any proper evidence at command. The succession, original memorialist, was the complainant in the Court of Claims; the judgment was responsive to the demand. If Arthur Denis, as executor, was the sole claimant, the award is incontestably his, and we are masters of the field. If, on the other hand, it be true (as is alleged and proved), that plaintiffs in error, in a supplemental and sworn memorial, laid claim to the whole fund—contradictorily with the succession *ex necessitate rei*—the award in passing their rights over in silence is conclusive against them and forms a perpetual bar. On either horn of the dilemma they are empaled.

III.—As to Res Adjudicata.

The estoppel arising from the former adjudication is next to be considered.

Plaintiffs in error in their opposition to the tableau aver that "they directly intervened and took part as co-plaintiffs and co-petitioners in said proceeding or claim No. 603," and, further. "that no award would or could have been made or allowed. but for the intervention and presence in said proceedings of your opponents." Record, page 7.

The question of estoppel, or *res judicata*, is thus raised directly.

The ownership of the fund to be awarded was then and is now before the court. Identity of object and cause of action being evident. and the parties and their capacity being the same (the executor and all the universal legatees joined with him in the memorial on the one hand, and the French legatees on the other), how can this matter be again litigated?

The presence, in the first suit, of the Government of the United States, not a party to the present action, is no impediment to the successful presentation of the plea. In a Louisiana case it was once said that "res judicata cannot be defeated by making another party co-defendant with the one pleading it. This would be an easy mode of defeating the plea in all cases." Ross vs. Brentel, 14 La. Annual, 798).

In a Tennessee case it was said: "The estoppel of a judgment extends to all matters material to the decision of the cause, and which the parties might have had decided, although not actually litigated."

Londsey vs. Thompson, 1 Tennessee Ch. 272.

A fortiori, it seems, when the matters have been actually litigated.

In Aurora City vs. West this court say: "Courts of justice, in stating the rule, do not always employ the same language; but where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in *rem judicatam*, and the former judgment in such a case is conclusive between the parties. Except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litgation, and which the parties exercising reasonable diligence might have brought forward at the time." 7 Wallace 102; reaffirmed in Beloit vs. Morgan, 7 Wallace 622.

We may well dismiss the present inquiry.

IV. ON THE MERITS.

The principle that the constitution, laws and treaties of the United States are the supreme law of the land, binding on the judges in every state, is not contested. But we deny its application here.

Because a fund has been collected from the United States under an award of a commission created by a treaty and exercising authority under the United States, it is assigned as error that the state court, in deciding the rights of claimants *inter se* to the said fund, "has violated and nullified the provisions of said treaty, and has rendered invalid the authority exercised under the United States" (See 3d assignment of errors, record, page 68.)

And the decision of Comegys vs. Vasse, 1 Peters 193, is confidently relied on by our adversaries. (See plaintiffs' brief, page 12, et seq).

The facts in that case, as we understand them, were as follows:

Vasse was an underwriter on ships and cargoes belonging to citizens of the United States, which were captured by Spanish privateers or vessels, carried into the ports of Spain and her dependencies, and condemned. The owners made abandonments to Vasse, who subsequently went into bankruptcy. The assignees appointed to his estate recovered from the treasury of the United States the sum of $8846 14, awarded by the commissioners under the treaty with Spain of February 22d, 1819 (8 Statutes at Large, page 260), on account of the captures and losses aforesaid. Vasse then sued his assignees for a restitution of the sum awarded, claiming the same as owner, and recovered judgment in the Circuit Court of Pennsylvania. On writ of error to the Supreme Court of the United States the judgment was reversed; and the court decided that the amount awarded, by the abandonment had passed from the original owners of the ships and cargoes (who were American citizens), to Vasse, the underwriter, and, by reason of his bankruptcy, vested in the assignees of his estate. The case substantially decides two of the points which we contend for, viz.: 1st. That the sums awarded to the administrator or assignees in bankruptcy of the *original* claimant (in case of his death or bankruptcy before the treaty is made) become assets of his succession or insolvency, and distributable as such

in the hands of his administrator or assignees. 2d. That the commissioners are to look into the *original claim* for damages alone, without considering upon whom it may in the meantime have devolved. It decides, in the 3d place, that an indemnification for unjust captures is not a donation, but a right.

Extracts from the decision on these three points are here given.

1. "It will not admit of question that the rights devolved upon Vasse, by the abandonment would, in case of his death, have passed to his personal representatives; and when the money was received, be distributed as assets. Why, then, should it not be assets in the hands of the assignee?" 1 Peters 218.

"There cannot be a doubt that if the party injured had died before or after the treaty was made, and compensation had been subsequently decreed, it would have been assets, and distributable as such, in the hands of his executors and administrators." Ibid. 217.

2. "But it does not necessarily or naturally follow that this authority so delegated includes the authority to adjust all conflicting rights of different citizens to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself; and it is wholly immaterial for this purpose upon whom it may, in the intermediate time, have devolved; or who was the original legal, as contradistinguished from the equitable owner, provided *he* (the original claimant) was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees or personal representatives, or *bona fide* purchasers, was not necessary to be ascertained, in order to exercise their functions in the fullest manner." Ibid. 212. (Italics and words in brackets our own.) * * * *

"The validity and amount once ascertained by their award, the fund might well be permitted to pass into the hands of any

claimant; and his own rights, as well as those of all others who asserted a title to the fund, be left to the ordinary course of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights or equities of all the parties." Ibid. 212-213.

3. "The theory, too, that an indemnification for unjust captures is to be deemed, if not a mere donation, as in the nature of a donation, as contrasted with right, is not admissible. It is reasoning against the clear text of the treaty itself. * * * * The very ground of the treaty is that the municipal remedy is inadequate, and that the party has a right to compensation for illegal captures by an appeal to the justice of the government. It was never understood that the case was one to which the doctrine of donation applied. The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property in a municipal court of justice." Ibid. 216.

Such is the language of the court, such are the main points decided. If the Claims Commission, in the case of Wiltz, administrator of Delrieu, vs. The United States (record, pages 60 to 62), disregarded the principles laid down in the case just quoted, it is *brutum fulmen*. This court will not change its jurisprudence because it has pleased the Claims Commission in one or two, or even a series of cases, to transcend its powers under the convention creating it. "There was no authority delegated to the Commission (as is well said by Mr. Justice McEnery) to adjust all conflicting rights of different parties to the fund awarded." (Record, page 35.) The treaty narrowed the scope of investigation of the Commission to two inquiries, viz.: *one of jurisdiction*, whenever a claim was presented *on the part* of a French citizen (the original claimant evidently, and not his heirs or assignees), and *one of amount* to be awarded. Treaty articles I and VI.

Beyond that, an abyss in which the Commissioners would certainly meet with destruction and ruin. If they did not steer clear away from it in the Wiltz-Delrieu case, in the present instance they did. Their award, avoiding all allusion to the conflict between the French citizenship of the original claimant and the American citizenship of the derivative claimants, is in full accord with the treaty, as well as with the jurisprudence of this court.

The decision in Comegys vs. Vasse is a landmark. It was approvingly cited in Shepard vs. Taylor (5 Peters 675–710) and in Frevall vs. Bache (14 Peters 95). And in Judson vs. Corcoran it was said: "No doubt the district court had authority to hear and determine the equities of the parties, notwithstanding the judgment in Corcoran's favor by the board of commissioners. The question that an award like the present is not conclusive among adverse claimants, was settled in the case of Comegys vs. Vasse, 1 Peters 193, in 1828, and has not since been opened. (17 Howard 613–614.)

Finally, in Phelps vs. McDonald this court had occasion to say: "Such commissions as that which made the award here in question usually decide only as to the validity of the claim, and the amount to be paid. It is rarely, if ever, within their jurisdiction to decide upon the ownership of the claim. The validity of the claim depends upon the law of nations; its ownership, upon the local jurisprudence where the transfer is alleged to have been made." 99 U. S. 307.

Would not the same rule apply, if the transfer had been by inheritance? Why then should the commission inquire into the status, citizenship, or neutrality of the actual beneficiaries, if jurisdiction and extent of powers did not hinge on that point?

Before dismissing this subject, it may be well to notice the distinction between a *donation* proper and a *right of compensation* for spoliations. Of the former class was the claim of the heirs of Emerson, based on an act of congress for their relief. A certain

sum of money having been awarded them, and being sought to be subjected to the payment of the debts of Emerson, deceased, as part of his estate, this court, on a writ of error, reversed the decision of the Supreme Court of Louisiana, and declared that, being a donation to the heirs of Emerson, the fund could not be considered as succession assets, liable for the payment of debts. (Emerson vs. Hall, 13 Peters 411.)

But on what basis does this principle rest? On the non-liablity of the government; because Emerson, "although rendering a meritorious service to the public, was acting under no law, nor by virtue of any authority. And his acts imposed no obligation, either in law or equity, on the government to compensate him for his services." 13 Peters 412. And such a claim, says the court, "having no foundation in law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the government, from motives of public policy or any other considerations, shall think proper, under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift, or pure donation. A donation made, it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the government." Ibid. 413.

The court further says: "*A claim against a foreign government for spoliation is not of this character. The demand in such a case is founded upon the law of nations, and the obligation is perfect on the offending government.*" *Ibid. 413.* (Italics our own).

To the same effect, the language of the court in Phelps vs. McDonald:

"There is no element of a donation in the payment ultimately made in such cases. Nations, no more than individuals, make gifts of money to foreign strangers. Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. * * * *

If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of property, pass to the assignee. The right to indemnity for the unjust capture or destruction of property, whether the wrongdoer be a government or an individual, is clearly within this category." (99 U. S. 303, 304).

If a claim against a foreign government for spoliations be a right, it existed at the time of such spoliations and ever since. The treaty of 1880 did not create the claim, but only recognized it such as it existed already. Inchoate and dormant in the Marquis de Circé, it needed but the magnetic touch of the treaty to develop into a complete right, with an adequate remedy and a forum to enforce it. And, therefore, the existence of the right in the spoliated French marquis, as far back as the period of our civil war, excludes the idea that his wife's legatees (two successions and two wills interposing) can possibly be the claimants *on whose part* redress is sought (Treaty, article I.)

The foregoing argument disposes of assignment of errors No. 6. (Record, p. 68.)

The remaining nine assignments of error will be here briefly considered.

Assignment of error No. 8 (record, page 69), while correctly expounding the principle laid down in Comeygs vs. Vasse, that the award ascertains only the validity and amount of the claim, overreaches itself when, invoking the commission's rulings, it says, that plaintiffs in error are and were the parties entitled to the same—for that is the very matter which (under the decision) is left open for future consideration in a contest of the beneficiaries *inter se*, in the established courts and in the ordinary course of judicial proceeding. And as for the treaty itself, it is invoked in vain, being eloquently silent on the subject.

Assignment of error No. 2, being somewhat similar, meets with the same fate. (Record, pages 67 and 68.)

Assignment of error No. 9 is based on parol and documentary evidence, at which our bills of exception were aimed. Excluding the same from the record, the assignment of error falls to the ground.

In assignment of error No. 10 it is said that the executor was acting also as attorney-in-fact for all the legatees. Hence his duty to deal impartially towards all. And if he received the funds as executor, his duty was again to make a division amongst all, and not to turn it over to the French heirs.

Plaintiffs in error in their assignment No. 11 vainly assert that the treaty has coupled the condition of French citizenship to the quality of heir in the person seeking the indemnity. There is no such comfort to them in the treaty.

Nor does the treaty require that the actual claimants, by whatever title, devise, descent or conveyance, should be at the date of the award citizens of the country recovering. (See assignment of error No. 7.)

The contention in assignment of error No. 1, that the funds in controversy ought not to be considered as ordinary assets of the succession of Mrs. Foucher de Circé, distributable as such, is in flagrant violation of the decision in Comegys vs. Vasse and similar cases. The source from, and the conditions under which the funds came into the hands of the executor, are only elements in the history of the claim, and are not here for construction. Gill vs. Oliver, XI Howard, page 548.

Assignment of error No. 5 suggests this question: Suppose that Mrs. Foucher de Circé had died after the treaty had been negotiated and the claim had been presented by herself, a French citizen, and suppose that the award had even been made during her life, would a collection of the award made subsequent to her death, and the distribution made thereunder, be controlled by the citizenship of her heirs? Yet it is assigned as

error that "no legatee named by her could take or receive any part of the fund collected under the treaty unless such legatee was authorized, empowered and entitled to take and receive under such treaty." This having clearly reference to the time of the *distribution* of the funds, and not to the time of the award, the presentation of the claim, or the negotiation of the treaty. Under this theory so many contingencies may arise that an unambiguous treaty would be the gem in the frog's head.

Assignment of error No. 4 complains that the award was made to the executor impressed with a trust in favor of the French heirs, or to him as agent. Not as agent certainly; for the award must be construed with reference to the memorial filed by Denis, executor. Not as executor with an impressed trust; for the award is silent in that regard. Again, why should the funds go to a trustee, when the principal is there claiming in person? It is evident that Denis received the funds as executor of the original French claimant, without any conditions or stipulations limiting payment to the French citizens. (See 4th assignment of error, page 68).

This thorough review of the eleven assignments of error in the record (pages 67 to 70) brings our case to a close. A needle in a haystack is more easily found than a federal question under the statutory requirements in the case at bar. Such was the opinion of the Chief Justice of Louisiana, who, however, granted the writ with infinite grace and modesty. (Record, page 65).

A right, title, privilege or immunity under a treaty, commission or authority of the United States, must stand on its own bottom, and in the full light of the two judiciary acts of 1789 and 1867. It will not do, when groping in darkness, to mistake every circumstance, fact or element in the history of a case, for an enemy of the constitution and treaties of the United States and commission or authority exercised thereunder.

A clever disposition of all the necessary ingredients of this case in petition and assignment of errors, however much to be

admired, cannot whiten the black or blacken the white. This prerogative belongs exclusively to the res judicata.

Rare as a tropical plant in the arctic circle is the authority which will hold that a distribution of funds by an executor between legatees of a succession necessarily involves, as a federal question, the source from which said funds are derived. This is the whole case, after all.

We respectfully submit that the want of jurisdiction is apparent and the case ought to be dismissed. If not dismissed, that the judgment of the state court is correct and should be affirmed with costs.

Respectfully submitted.

HENRY CHIAPELLA,

Counsel for Defendants in Error.